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CASES FOR ABSTRACTING - EQUITY, REAL PROPERTY, BILLS AND NOTES, LANDLORD AND TENANT

1922

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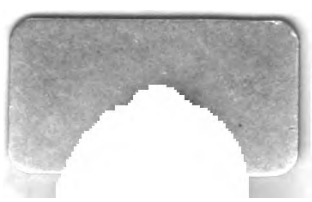

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CASES FOR ABSTRACTING

SOPHOMORE CLASS

SECOND SEMESTER

EQUITY
REAL PROPERTY
BILLS AND NOTES
LANDLORD AND TENANT

SUFFOLK LAW SCHOOL
BOSTON, MASSACHUSETTS
1922

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1. Nature of the case
2. Facts
3. Question in dispute
4. Decision
5. Grounds for decision

PREFACE

THIS booklet is in no sense a case book, but merely a collection of cases (one of a series of eight booklets) to be abstracted in writing by students of Suffolk Law School.

To teach them how to analyze law at its source and deduce legal principles from judicial opinions is the sole object of these booklets. Every lawyer should be able to read a Supreme Court decision and form a reasonably correct interpretation of the law involved therein.

The following cases are to be abstracted in writing in accordance with the five point method, so called, as described in Chapter 7 of Dean Archer's booklet on Introduction to the Study of Law. All cases listed in the table of cases for a given month must be passed in on or before the last day of the month.

By a new rule of the school the term averages of a student will be withheld until he has completed his abstract work.

Suffolk Law School
January, 1922

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EQUITY CASES

FEB

PRATT v. TUTTLE.

126 Mass. 233.

Supreme Judicial Court of Massachusetts, 1883.

Holmes, J. This is a bill in equity for an account of the net profits of the sale of certain patented wares, which were made and sold under patents belonging to, or controlled by, the plaintiffs, in pursuance of agreements between the plaintiffs and the defendants Tuttle and Whittemore. By these agreements, Tuttle and Whittmore were to purchase the patents, and, to that end, were to make and sell the patented articles and pay over one-half the net profits to the plaintiffs until the whole agreed price was paid, whereupon the patents were to be transferred. The Tuttle and Whittemore Manufacturing Company, a corporation which has actually done the work, is joined as a defendant. All the defendants demur.

There is no doubt that the bill can be maintained against Tuttle and Whittemore. They have agreed to turn over net profits as such. Their obligation is not a simple debt, like that of bankers; Foley v. Hill, 2 H. L. Cas. 28; nor a personal obligation to pay a sum of money from their general funds by way of royalty; but they have made themselves trustees, or quasi trustees, of a specific identified fund, which it is alleged that they have received and not paid over. Such a fiduciary relation founds the equitable jurisdiction invoked, as well as cross demands and complexity of accounts. Badger v. McNamara, 123 Mass. 117, 119. Mackenzie v. Johnston, 4 Madd. 373. Foley v. Hill, 2 H. L. Cas. 28, 35. Padwick v. Stanley, 9 Hare 627, 628. Hemings v. Pugh, 4 Giff. 456, 459. Moxon v. Bright, L. R. 4 Ch. 292, 295. See Barry v. Stevens, 31 Beav. 258.

But the demurrer of the defendant corporation must be sustained. All that is alleged against it is that Tuttle and Whittemore own nearly all the stock in it; that when they made their contracts, they intended to perform them, or a part of them, through its agency; and that, in fact, it has done the work and made the profits to be done and made by Tuttle and Whittemore, as their creature and agent, with full knowledge of their contracts above mentioned. But all this may be true without making the corporation accountable to the plaintiffs.

While it is assumed that the work was lawfully done by the corporation, and there is no attempt to charge it as an infringer of the plaintiff's patents, which could not be done in this court, there is no allegation that the company has been substituted for Tuttle and Whittemore as a party to the contract, but the contrary is implied. The fact that it has done the work in their place is therefore immaterial, taken by itself.

Tuttle and Whittemore's control over the corporation again is no ground for a decree against it; but rather the reverse. It is not shown that Tuttle and Whittemore are using it, or taking advantage of the legal difference between the corporation and its members for any fraudulent purpose. The bill does not charge that it is necessary for accounts to be taken, or payments to be made, between the corporation and Tuttle and Whittemore before they can pay, or know what to pay, the plaintiffs, if such an allegation would make any difference; nor that the corporation has profits in its hands, in which the plaintiffs have an interest. If the latter allegation were made, the corporation being the mere creature, agent, and servant of Tuttle and Whittemore, the question would remain whether its possession was not their possession, and whether equity would attempt to convert an agent into a trustee. Nickolson v. Knowles, 5 Madd. 47. Morgan v. Stephens, 3 Giff. 226, 236. Crawshay v. Thornton, 2 Myl. & Co. 1, 22. But that question we do not consider.

Ordered accordingly.

IN RE ADAMS.

L. R. 27 Ch. Div. 394.

Chancery Division, 1884.

Baggallay, L. J. The question involved in this appeal is whether, having regard to the trusts of the will of George Smith, a trust is created in favor of the children of the testator. The will is a very short will, and is as follows:

"I give, devise and bequeath all my real and personal estate and effects,

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whatever and wheresoever, unto and to the absolute use of my dear wife, Harriet Smith, her heirs, executors, administrators and assigns, in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease."

I think, if it was not for authority, or alleged authority, no one would have any difficulty in construing this will according to what would appear to be the plain and evident intention of the testator. The observations of the master of the rolls In Re Hutchinson, 8 Ch. Div. 540, 542, appear to me to apply as clearly to the form of devise and bequest in this case as to that which was before him. Referring to the words which are alleged to imply a precatory trust, he says: "In my opinion, these words, standing by themselves, independently of authority, are not intended to impose any obligation on the widow. They are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation. His widow is to have power to give the property to anyone she may think fit. She is to be complete owner of the property, but he expects her to dispose of it among his family,—that is, his children. There is no occasion to tell her that she is to provide for herself, there being already a prior absolute gift to her. If you make the power override the absolute gift, the wife gets nothing, for you could then only give her an interest by inserting in the power something which is not there, namely, the word 'wife.' If you do not put in that word you make her a trustee for the testator's family,—that is, his children only; for there is no reported case in which the word 'family,' when used by a married man, has been held to include his wife as well as his children."

Those words apear to me to be as fully applicable to the will which is now under consideration as that which was then under consideration. There can be no doubt, as stated by Mr. Justice Pearson, when this case was before him, that there is some conflict between modern authorities on subjects of this kind and tLe older authorities, and the question arises, in a case of this kind, which authorities ought to be followed. In this case many of the older authorities had been cited before him, as they have been cited before us today, and he came to the conclusion that the principle enunciated by Lord Justice James and Lord Justice Mellish in the case of Lambe v. Eames, L. R. 6 Ch. 597, 599, is applicable to the case under consideration. Now, Lord Justice James, in the course of his judgment in the case of Lambe v. Eames, made an observation in which I thoroughly concur: "Now the question is, whether those words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the court of chancery in interposing trusts where in many cases the father of the family meant to create trusts must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that no such trust was intended, and that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise."

Now a somewhat curious circumstance in this case is that we are actually called upon to construe this will of Mr. George Smith in the absence of the parties on both sides who may be interested in having this construction decided. We have neither the wife nor the children here, but the wife having sold the property in the capacity, or assumed capacity, of being able to sell, the purchaser from her has assigned the property to another purchaser, and that purchaser says that he has not a good title. Under these circumstances we have neither the wife nor the children here to argue the question of construction. Fuly concurring, as I do, with the observations of the learned judges in Lambe v. Eames, L. R. 6 Ch. 597, I agree with Mr. Justice Pearson, and I think he was right in considering that the principles enunciated in that case were applicable to that which we are now considering; nor have we found anything in the authorities that would militate against this decision, which would clearly come within the particular words of the will which Mr. Justice Pearson had to construe. At the same

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time, I agree with what Mr. Justice Pearson said, that there being a different view adopted by courts of equity in more recent years from what was adopted some years ago as regards what were called precatory trusts, it has long been decided that those views are not to be extended, and I think we should be extending them if we were to apply them to the case now under consideration.

I think the conclusion at which Mr. Justice Pearson has arrived is the true view.

URANN v. COATES.
109 Mass. 581.

Supreme Judicial Court of Massachusetts, 1872.

A. conveyed to B. certain land by an absolute conveyance, B. agreeing orally to hold in trust for A. after satisfying claims he held against A. At B.'s death the following writing was found among his papers:

"Boston, July 21, 1865. I, Benjamin Rand, having purchased the estate of Isaac P. Rand, of Roxbury, said estate being situated partly in Roxbury and partly in Dorchester, in the State of Massachusetts, for his deed delivered to me on July 21, 1865, do hereby agree and bind myself and my heirs to pay over to the said Isaac P. Rand whatever balance shall remain over and above the amount necessary to discharge my original claims against Isaac P. Rand, and the charges against the said estate, which by my purchase of the same have become vested in me, the said payment to be made when all such claims and charges shall have been fully liquidated and discharged. * * * And also in all charges and expenses which have been or shall be incurred by me or my heirs in discharging the above claims and charges and in carrying on the estate. Benjamin Rand."

This was followed by the memorandum which is given in the opinion. The plaintiff, who is the assignee of A., brings this action against the heir and administrator of B. to recover the bal- of the claims of B.

Colt, J. The bill charges that Benjamin Rand held the land conveyed to him by the absolute deed of Isaac P. Rand, upon trust to apply the avails of it to the payment of certain incumbrances and debts due him, and to account for any surplus to Isaac P. Rand, the grantor, to whose right the plaintiff, as assignee, has succeeded. The writings by which it is claimed that this trust is declared are fully set forth, and it is alleged that under the trust sales have been made of more than enough to pay all demands and charges, leaving a surplus, to which the plaintiff is entitled.

The defendants file a plea denying that Benjamin in his lifetime held the land upon any such trust, or that any trust was devolved upon them, as his representatives, by his death. The purpose, no doubt, is to obtain first the decision of the court upon the question whether, upon the facts disclosed, any trust is raised which can be enforced; for, if no trust shall be found to exist, then the investigation of long and detailed accounts will be avoided. This is the point which was argued at the bar, and we proceed to its consideration without regard to supposed irregularities in the pleadings.

The land in question was conveyed by an absolute quitclaim deed, dated on the 15th, but delivered on the 21st day of July, 1865, to Benjamin, who then held large demands against Isaac P. Rand, secured by mortgage on the same premises. The evidence sufficiently proves that Benjamin orally agreed, at and before the time of the delivery of the deed of the equity, and as part of the transaction, that any surplus over and above his claih that might remain of the estate or its proceeds should belong to Isaac P. No written memorandum of the agreement was made before the delivery of the deed, but it was suggested at the time that Benjamin should put it in the shape of a memorandum, safely deposited, in case anything should happen to him. And Benjamin afterwards informed Isaac P. that soon after the transaction he made a memorandum of the agreement. No such paper was ever delivered to, or came into the possession of, Isaac P., but after the death of Benjamin a writing of that description was found safely deposited in his bank trunk. By the terms of this writing, he agreed to pay over any balance of the

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estate remaining, substanially in accordance with the oral agreement. It was signed by Benjamin, and dated July 21, 1865; and underneath the first signature was an additional statement, also signed, in these words: "'This memorandum is made by me for the use of my executor or administrator only. Neither Isaac P. Rand, nor those claiming under him, have any legal or equitable claim against me or my estate; but upon payment of my debt, interest, and all charges, as above mentioned, any balance shall inure to the benefit of Isaac P. Rand and those claiming under him."

We are of opinion that this writing is sufficient as a declaration of trust, within the meaning of our statute. It is much more formal and particular in its statement than declarations of this description by letter by answers in chancery, affidavit, recital in bond or deed, or in pamphlet, which all have been held sufficient and with reference to which it is held to be no objection that they were drawn up for another purpose and not addressed to, nor intended for the use of, the cestui que trust. See cases cited in Brown, St. Frauds, §§ 98, 99.

It is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust. It is a question of fact, in all cases, whether the trust had been perfectly created; and upon that question the delivery or nondelivery of the instrument is a significant fact, of greater or less weight according to the circumstances. If the alleged trust arises from mere gift, delivery of the writing by which it is declared in not always required as proof that the gift was perfected, for the court will consider all the facts bearing upon the question of intention, and it has been held that if a party execute a voluntary settlement, and the deed recites that it is sealed and delivered, it will be binding on the settlor, even if he never parts with it and keeps it in his possession until his death. Bunn v. Winthrop, 1 Johns. Ch. 329; Perry Trusts, § 103, and cases cited. It must always, however, appear that the fiduciary relation is completely established, and not left as a matter of executory agreement only, regard being had to the situation of the property, the relations of the parties, and the purposes and objects had in view. In this case the verbal agreement in which the trust originated was made in consideration of the conveyance by Isaac P. of his interest in the real estate, and the trust is founded on a good consideration. The fact is of weight in aiding the court to cary out the intention of the parties; and the want of a delivery of the memorandum becomes of less significance.

The law as thus laid down is to be found mainly in decisions under the words of the English statute, which requires that all declarations and creations of trust shall be manifested or proved in writing. These were the words of our earlier law (St. 1783, c. 37, § 3), and they remained until the first general revision of the statutes; the requirement of the present statute being that the trust shall be created or declared in writing. Gen. St. c. 100, § 19. The same change has been made in other states; and in those in which the question has been incidentally before the courts the tendency is to rule that this abbreviation in the words does not change the law, and that "created or declared" are equivalent to "manifested or proved." Trusts may be created in the first instance in writing. They more commonly originate in the oral agreements and transactions of the parties, and are subsequently declared in writing. Our statute embraces both descriptions. It had been settled by repeated decisions under the old statute, when this change was made, that an express trust was sufficiently declared if shown by any proper writen evidence disclosing facts which created a fiduciary relation. Under this construction, the additional words of the old statute seemed immaterial, and are omitted. And we are of opinion that no change in the meaning or effect of it was intended or made. Perry, Trusts, § 81, and cases cited.

In view of the law thus stated, the fact that there was no delivery of the memorandum in this case is not of controlling importance. It is impossible to account for its existence and safe preservation, unless there was an intention that it should be used, if necessary, to prove a trust. The statement that it is made for the use of the executor or administrator of the trustee implies this.

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The cestui que trust was imformed of its existence; and by its terms a perfect trust is declared. It is, indeed, declared that neither Isaac P., nor those claiming under him, have any legal or equltable claim against the maker or his estate. But this statement if such was its intention, cannot control the effect of the memorandum in establishing the trust. That results, as a matter of law, from the proof. We are inclined to think that its intention was not to defeat an equitable claim to the proceeds of the estate conveyed, but only to protect the maker against personal responsibility beyond the actual receipts in administering the trusts. Decree for the plaintiff.

TIERNEY v. WOOD.
19 Beav., 330.

Cases in Chancery, the Rolls Court, 1854.

In January, 1836, Alexander Wood purchased a house, a close of land, and premises, situate at Little Hampton, in Sussex, for the sum of £490. They were conveyed to the plaintiff Tierney in fee, who admitted he held them in trust for Wood.

About the same time, Wood transferred a sum of stock into the plaintiff's name; but by his direction the plaintiff afterwards sold it out, and delivered the proceeds of the sade to Wood.

Soon after the purchase of the house, land, and premises, Wood delivered to the plaintiff a paper writing, signed by him, and dated January, 1837, in these words: "I hereby desire that, after my death, the stock now in the Bank of England, with the house and land now belonging to me at Little Hampton, shall be held by you, as you at present hold it, for the benefit of my wife, Elizabeth Wood, during her life, and that after her death the same shall continue to be held by you as aforesaid, for the sole benefit of my daughter, Mary Wood, in such sort that it shall be wholly and entirely free from all control of any person with whom she may intermarry. I further desire that, in case my said daughter Mary should leave issue by any marriage which she may contract, the whole of the above property shall pass to such issue, in such manner as she may direct; but that, in case she should die without issue, the whole of the above property shall be equally divided among the lawful issue of my son Alexander Wood, born after 1834, he to have the interest and profit arising from the property during his life. If my son should die without issue, I desire that all the property be sold, and the money be equally divided among my late brother's children now living at Old Craig," etc. "After the death of my wife, I wish my som Alexander to be paid £100 in money, or to be paid £5 a year during his life. If my son Alexander and my daughter Mary have both issue, let the property be equally divided among them; if they have no issue, give £100 to such charity as Mr. Jones's at St. Leonards. Let my son have my books on gardening, my shirts, or any of my clothes that may be of use to him, if he desire to have them.

"Alexander Wood. January 1837.
"To the Rev. M. A. Tierney."

Alexander Wood, the elder, died in 1844, intestate, and the plaintiff allowed Mrs. Wood, the widow, to receive the rents of the premises, till her death in June, 1853.

Alexander Wood, the son and heir at law of Alexander Wood the elder, and Mary Wood, the daughter, were living; but the latter has never been married, and questions having arisen as to the rights of the parties interested in the property of Alexander Wood the elder, and as to the effect of the paper writing, the plaintiff instituted the suit to obtain the opinion of the court thereon.

The master of the Rolls was of the opinion that Mary Wood took an estate tail, but reserved his judgment as to the validity of the declaration of trust.

The Master of the Rolls. The question is, whether the document dated in January, 1837, created a good declaration of trust within the seventh section of the Statute of Frauds. That clause is in these words, or to this effect: That after the 24th of June, 1677, all declarations or creations of trusts, or confidences of any lands, tenements, or heriditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

The first question raised is, whether Alexander Wood is the person who is by law enabled to declare the trusts of these lands.

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The second question is, whether, if he be, this is a declaration of trust, and such a one as can be acted upon.

There is no question but that on the purchase of this property by Alexander Wood, and the conveyance thereof to the Rev. M. A. Tierney, a resulting trust arose in favor of Alexander Wood, which as it is expressly excepted by the eighth section of the Statute of Frauds, does not require to be evidenced by any writing. In the year 1836, therefore, and previous to the singing of the document, the property in question was vested in M. A. Tiehrney, in fee, in trust for Alexander Wood, in fee simple. Alexander Wood, therefore, was the beneficial owner of this property, and Mr. Tierney had the mere naked legal interest in it. A distinction may be raised between the person who is by law enabled to declare, and the person who is by law entitled to create the trust. I consider, in the first place, who was by law entitled to create a trust in this property; and, first I examine what, in such a state of things, would have been the effect of this document, so far as it relates to the stock, which had been transferred into the name of M. A. Tierney, if this had not been sold out afterwards by the direction of Alexander Wood, and the direction to pay the dividends had been complied with by Tierney. The result would have been that the relation of trustee and cestui que trust between Tierney and the person mentioned in the instrument would have been completed, so far as that stock was concerned, and the fact that the document had been a voluntary act on the part of Wood would not have prevented this court from acting upon it. The case of Ex parte Pye and Dubost, and the authorities referred to in Bridge v. Bridge, 16 Beav. 315, decided by myself, establish this proposition. Those authorities show that the proper person to create the trust in personal property is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and, if disposed to refuse, may be compelled, to obey it.

I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that, if Mr. Tierney had, in pursuance of this paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any trusts not recognized or sanctioned by Alexander Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no interest to the supposed cestui que trust. A declaration of trust in writing by Tierney following that of Wood would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same; and that, consequently, the beneficial owner is the person by law enabled to declare the trust.

This is confirmed by the expression in the clause in the statute which relates to "the last will in writing," which can only apply to the beneficial owner It may also be observed, that if the statute had intended that no trust should be valid, unless evidenced by a writing signed by the trustees, the simple, and obvious course would have been to have so stated it; but the expression used is not "the trustee," but "the person by law enabled to declare the trust." That person is, I think, the beneficial owner; and I am of opinion that, apart from any question of the construction of the document, the fact of its having been signed by Wood, the beneficial owner, transmitted by him to Tierney, the legal owner, and by him acted upon, constitutes it a sufficient declaration of trust within the seventh clause of the statute, so far as that clause requires it to be signed "by the party who is by law enabled to declare such trust."

The next question is whether the docu-

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ment itself, apart from the signature, is or purports to be a declaration of trust at all. It is contended that, if anything, it is a will imperfectly executed, that it contains no direction as to the present application of the rents, and that the rest of its contents savor of the directions contained in a will rather than of a direction how to apply the rents of the property; for that is not to take effect till after the death of Alexander Wood, and that it contains directions for sale and the like, inconsistent with the nature and duties of the trust which M. A. Tierney had accepted. There is, undoubtedly, some force in these observations; but, on the whole, I think that this may be treated as a valid declaration of trust. Although it does not declare the whole trust, it declares the trust in part, and it leaves the resulting trust untouched, except where it expressly interferes therewith. If this document had directed Mr. Tierney to pay the rent to Mr. Wood during his life, and had then proceeded as it does, this objection could not, in my opinion have been sustained; but this omission is not sufficient to destroy the character of the rest of the interest, which, unless where it otherwise disposes of the beneficial interest in the property, leaves it untouched, under the resulting trust vested in Mr. Wood. I am of opinion, therefore, that a good trust was evidenced by this writing within the Statute of Frauds.

The only remaining question is the interest which Mary Wood takes in the land so held in trust for her, and my opinion is that she takes an estate tail.

OLLIFFE v. WELLS.
130 Mass. 221.

Supreme Judicial Court of Massachusetts, 1881.

Bill in equity, filed December 11, 1877, alleging that the plaintiffs were the heirs at law and next to kin of Ellen Donovan, who died in Boston on May 23, 1877, and whose will, which was duly admitted to probate, after giving various legacies, contained the following clause; "13th. To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him;" and nominated said Wells to be the executor.

The bill further alleges that Wells, who had been appointed executor by the Probate Court, claimed the right, after payment of the legacies, to dispose of the residue of the estate according to his own pleasure and discretion, and contended that he had received directions from Ellen Dovovan as to the disposition of said residue; whereas, as the bill charged, the legacy of the residue of the estate had lasped, and said residue should be distributed among the heirs at law and next to kin to the testatrix.

The bill prayed for a discovery, an account, an order for payment of the residue to the plaintiffs, a temporary injunction against distributing the residue of the estate, and for further relief.

The answer admitted the making of the will and the appointment of the defendant as executor; left the plaintiffs to prove whether they were the heirs at law and next of kin of the testatrix; and averred that the testatrix, before and at the time of and after the execution of the will, orally expressed and made known to the defendant her wish and intention that the rest and residue of her estate should be disposed of and distributed by the defendant, as executor of her will, for charitable purposes and uses according to his discretion and judgment, and directed the defendant so to dispose of and distribute the said rest and residue; especially expressing to the defendant her desire that the poor, aged, and infirm, and the children and others in need, and worthy of charity and assistance, under the care of or connected with Saint Stephen's Mission, of Boston, and other deserving friends and deserving poor, should be aided and assisted out of said rest and residue, if the defendant in his discretion should see fit so to do; that the defendant desired and intended, unless otherwise ordered by the court, to dispose of and distribute the said rest and residue for charitable purposes and uses, according to his discretion, and especially for the benefit of the deserving poor, aged, and infirm, and the children and others in need and worthy of charity and assist-

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ance, under the care of or connected with said Saint Stephen's Mission, and other deserving friends and deserving poor, as requested and directed by the testatrix; and that testatrix, except by her will, gave to the defendant no written direction, wish or order as to the distribution of the residue of her estate remaining after the payment of the legacies.

The case was heard by Colt, J., and reserved for the consideration of the full court, on the bill and answer, and an agreement of the parties that the facts alleged in the answer should be taken as true. If these facts did not show a defence to the bill, the case was to be sent to a master, to determine whether the plaintiffs were the heirs and next of kin of the testatrix, and the amount of the residue of the estate; otherwise, the bill to be dismissed.

Gray, C. J. Upon the face of this will the residuary to the defendant gives him no beneficial interest. It expressly requires him to distribute all the property bequeathed to him, giving him no discretion upon the question whether he shall or shall not distribute it, or shall or shall not carry out the intentions of the testatrix, but allowing him a discretionary authority as to the manner only in which the property shall be distributed pursuant to her intentions. The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. Nichols v. Allen, ante, 211. No other written instrument was signed by the testatrix, and made part of the will by reference, as in Newton v. Seaman's Friend Society, ante, 91.

The decision of the case therefore depends upon the effect of the fact, stated in the defendant's answer, and admitted by the plaintiffs to be true, that the testatrix, before and at the time of and after the execution of the will, orally made known to the defendant her wish and intention that the residue should be disposed of and distributed by him as executor of her will for charitable purposes according to his discretion and judgment, expressing her desire as to the objects to be preferred, all of which objects, taking the whole direction together, may be assumed to be charitable in the legal sense.

In any view of the authorities it is quite clear, and is hardly denied by the defendant's counsel, that intentions not formed by the testatrix and communicated to the defendant before the making of the will could not have any effect against her next of kin. Thayer v. Wellington, 9 Allen, 238; Johnson v. Ball, 5 De Gex & Sm. 85. Moss v. Cooper, 1 Johns. & Hem. 352. But assuming, as the defendant contends, that all the directions of the testatrix set forth in the answer are to be taken as having been orally communicated to the defendant and assented to by him before the execution of the will, we are of opinion that the result must be the same

It has been held in England and in other states, although the question has never arisen in this commonwealth, that, if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of third persons, and afterward refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator and of his own fraud, which a court of equity, upon clear and satisfactory proof of the facts, will enforce against him at the suit of such third persons. Chamberlaine v. Chamberlaine, 2 Freem. 34; Reech v. Kennegal, 1 Ves. Sen. 123, 125; S. C. Ambl. 67; 1 Wils. 227; Stickland, v. Alridge, 9 Ves. 516, 519; Jones v. Badley, L. R. 3 Ch. 362, 364; McCormick v. Grogan, L. R. 4 H. L. 82, 88, 97; Owing's Case, 1 Bland, 370, 402; Hoge v. Hoge, 1 Watts, 163, 214-216; Church v. Ruland, 64 Penn. St. 432; Williams v Fitch, 18 N. Y. 546; McLellan v. McLean, 2 Head, 684; Barrell v. Hanrick, 42 Ala. 60; Hooker v. Axford, 33 Mich. 453; Dowd v. Tucker, 41 Conn. 197; Williams v. Vreeland, 5 Stew. (N. J.) 135, 734. See also Glass v. Hulbert, 102 Mass. 24, 39, 40; Campbell v. Brown, 129 Mass. 23, 26.

Upon like grounds, it has been held in England that, if a testator devises or bequeaths property to his executors upon trust not defined in the will, but which, as he states in the will, he has communicated to them before its execution, such trusts, if for lawful purposes, may be proved by the admission of the ex-

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ecutors, or by oral evidence, and enforced against them. Crook v. Brooking, 2 Vern. 50, 106; Pring v. Pring, 2 Vern. 99; Smith v. Attersoll, 1 Russ. 266, and in two ot three comparatively recent cases it has been held that such trusts may be enforced against the heirs or next of kin of the testator, as well as against devisee. Shadwell, V. C., in Podmore v. Gunning, 5 Sim. 485, and 7 Sim. 644; Chatterton, V. C., in Riordan v. Banon, Ir. R. 10 Eq. 469; Hall, V. C., in Fleetwood's Case, 15 Ch. D. 594. But these cases appear to us to have overlooked or disregarded a fundamental distinction. When a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. Cullen v. Attorney General, L. R. 1 H. L. 190. Where the bequest is outright upon its face, the seting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the cestui que trust; and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. Boson v. Statham, 1 Eden, 508; S. C. 1 Cox Ch. 16; Russell v. Jackson, 10 Hare, 204; Wallgrave v. Tebbs, 2 K. & J. 313.

Where the bequest is declared upon its face to be upo nsuch trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no beneficial interest; and, as between him and the beneficiaries intended, there is as much ground for establishing a trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not exculded by the will itself. The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will. Sears v. Hardy, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See Lewin on Trust (3d ed.), 75. By the statutes of the Commonwealth, no will (with certain exceptions not material to be here stated) "shall be effectual to pass any estate, whether real or personal, nor to change or in any way affect the same," unless signed by the testator and attested by three witnesses Rev. Sts. c. 62, § 6; Gen. Sts. c. 92, § 6.

In Thayer v. Wellington, 9 Allen, 283, the testator by his will bequeathed to Hastings and Wellington $15,000 "in trust to appropriate the same in such manner as I may by any instrument under my hand direct and appoint," and nominated Hastings executor, and made a residuary bequest to him in trust for the benefit of certain persons named. The testator also signed a paper, dated the same day as the will, referring to it, and addressed to Hastings and Wellington, directing them to pay over the $15,000 to the city of Cambridge for the support of a public library; and they, after the death of the testator, signified in writing to the city their intention of so paying it when they should receive it from the executor. After the death of Hastings, upon a bill in equity by the administrator de bonis non for instructions, to which Wellington, the city, the cestui que trust, and the heirs at law of the testator, were made parties, the court held that the clause in the will, the paper signed by the testator but not attested as required by the statute of wills, and the assent in writing of the trustees, gave the city no right to the fund; and that the heirs at law or next of kin would have been entitled to it, but for its being included in the residuary bequest.

It appears in the report on file, upon which that case was reserved for the determination of the full court, that an attorney at law testified that he drew up both the will and the paper at the request of Hastings, and delivered both drafts to him; and that Wellington testi-

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fied that the paper was handed to him by Hastings after the testator's death. Those facts would, according to the cases of Crook v. Brooking and Smith v. Attersoll, above cited, and which were relied on in the argument for the city of Cambridge, have been sufficient evidence of an assent by Hastings before the execution of the will, and, according to the decision of Vice Chancellor Wood in Tee v. Farris, 2 K. & J. 357, would have entitled the city to enforce the trust against both trustees. Yet the court did not treat them as of any weight as between the surviving trustee and the city on the one hand, and the next of kin or the residuary legatees on the other, but merely observed that it did not appear at what time the paper was placed by the testator in the hands of Hastings. 9 Allen, 288.

Decree for the plaintiffs.

HARDING v. GLYN.

High Court of Chancery, 1739.

Nicholas Harding in 1701 made his will, and thereby gave "to Elizabeth, his wife, all his estates, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but did desire her at or before her death to give such lease, house furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations as he should think most deserving and approve of," and made his wife executrix, and died the 23d of Januray, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in the manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels, to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates' effects.

Master of the Rolls. The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words "wiling" or "desiring" have been frequently construed to amount to a trust, Eacles et ux. v. England et ux.; and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the court to determine what persons are meant, it is very strong for the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the statute of distributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and due order that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding, his wife, which she did not dispose of according to the power given to her thereby, in case the same remains in specie, of the value thereof, to be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.

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LAMBE v. EAMES.

L. R. 6 Ch. Ap. 597.

Court of Appeal in Chancery, 1871.

John Lambe, by his will, gave his freehold house in Cockspur Street, and all his estate, to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family." The testator died in 1851, leaving the widow and children. One of his sons had an illegitimate son, Henry Lambe, born in the lifetime of the testator, but after the date of his will.

The widow died in 1865, having by her will devised the freehold house in Cockspur Street to trustees upon trust for one of her daughters, Elizabeth Eames, but charged with an annuity for Henry Lambe.

Henry Lambe filed the bill in this suit to obtain payment for the annuity, which was disputed by Elizabeth Eames on the ground that the widow had only power of disposition amongst the family, and that Henry Lambe, being illegitimate, could not take under that power.

The Vice Chancellor Malins decided that the devise to the widow was absolute, and that she had therefore power to devise to the plaintiff, as reported.

The defendant Elizabeth Eames appealed.

Sir W. M. James, L. J. In this case my opinion is that the decision of the vice chancellor is perfectly right. If this will had to be construed irrespective of any authority, the construction would, in my opinion, not be open to any reasonable doubt

It is the will of a man who was in business as a shopkeeper, and was, when he made his will, in the prime of life, with a wife and young children, and it is to this effect. [His Lordship then read the will.] Now the question is, whether these words create any trust affecting the property; and in hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts must have been a very cruel kindness indeed. I am satisfied that the testator in this case would have been shocked to think that any person calling himself a next friend could file a bill in this court, and, under pretence of benefiting the children, have taken the administration of the estate from the wife. I am satisfied that it would be a violation of the clearest and plainest wishes of the testator if we decided otherwise.

The testator intended his wife to remain head of the family, and to do what was best for the family. If he had said, "I give the residue of my property to my three sons, each to take his share, to be at his disposition as he should think best, for the benefit of him and his family,"—in such a case it would be clear that the testator did not mean to tie the property up, but to give a share to each son, believing that he would do the best for his family.

But it is said that we are bound by authority. The cases cited may, however, be distinguished. In this will there is, in the first place, an absolute gift, and we have to be satisfied that this gift is afterward cut down. It was also argued that in some cases, as in Crockett v. Crockett, the court has decided there was some interest in the children, but did not declare what it was, leaving the matter to be dealt with after the death of the tenant for life.

It is possible that in this case there may be some obligation on the widow to do something for the benefit of the children; but assuming that there is such an obligation, it cannot be extended to mean a trust for the widow for her life, and after her death for the children, in such shares as she may think fit to direct. That would be to enlarge the will in a way for which there is no foundation; but unless the will has that meaning, what trust is there? I cannot agree that she is to take what she likes, and that what she has not spent is to go at her death for the benefit of her children. In Crockett v. Crockett, 2 Ph. 553, it was only decided that the children had some interest, and if the widow fairly satisfied that obligation, and gave them some interest, nothing more could be required.

Then this case was said to be like Godfrey v. Godfrey, 2 N. R. 16. But there the Vice Chancellor decided that there was an interest, though he did not define what that interest was. [His lordship then read and commented on the judgment in Godfrey v. Godfrey, and

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said that the ratio decidendi in that case was that there was a trust.] But it is impossible in this case to say that there was a trust. The testator clearly intended her to deal with the property as she pleased, and contemplated that she might risk it in his trade.

The other cases cited are merely illustrations of the same kind, and do not enable the court to escape from the difficulty of having to decide upon the meaning of the word "family." It seems to me impossible to put any restriction upon the meaning of that word, or to exclude any person who, in ordinary parlance, would be considered within the meaning The word might include sons-in-law, or daughters-in-law, and many others. It is equally uncertain what the property is, because, if she could spend any part for her own private purposes, then there might be nothing left for the trust.

It is impossible to execute such a trust in this court, and if the caes stood alone I should say that no sufficient trust was declared by the will. But if there be any such obligation, I think it has been fairly discharged by the way in which she has made her will,—giving part for the benefit of one member of the family, and part to a natural son, whom she might reasonably think it her duty to benefit.

It appears to me that the decision of the vice chancellor is right, and that the appeal must be dismissed.

SIR G. Mellish, L. J. I am of the same opinion.

IN RE WEBB'S ESTATE.

49 Cal. 541.

Superior Court of California, 1875.

Appeal from Probate Court, city and county of San Francisco.

Crockett, J. The claim of the father and sisters of the deceased to the fund in controversy can be sustained, if at all, on no other ground than that, by the two letters of the deceased to his sisters, he created and declared a present trust, to the effect that he held the policy of insurance in trust for his father and sisters. The transaction cannot be upheld merely as a donation inter vivos. There was no assignment or delivery of the policy to the father and sisters, and treated simply as a donation, it would fail for that reason. But a person intending to make a donation to another, and who clearly declares his purpose and transfers the title, need not necessarily part with the possession, provided he declares himself, in proper form, to be a trustee, holding possession for the donee. In such a case, he would thenceforth hold the property as a trustee and not in his own right. That such a trust, when properly declared, even in favor of a volunteer, is valid, and will be enforced, is established by numerous authorities. "Where there is no valuable consideration, yet, if the settler, by a clear and explicit declaration, duly executed and intended to be final and binding upon him, makes himself a trustee, courts of equity will enforce the trust." Perry, Trusts, § 96. "If the trust is perfectly created, so that the donor or settler has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settler, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed. Whether the trust is perfectly created or not is a question of fact in each case, and the court, in determining the fact, will give effect to the situation and relation of the parties, the nature and situtation of the property, and the purposes or objects which the settler had in view making the disposition." Id. §§ 98, 99.

In such cases the point to be determined is, whether the trust has been "perfectly created;" that is to say, whether the title has passed and the trust been declared, and the trust being executed nothing remains for the court but to enforce it. In discussing this question the court say, in Stone v. Hackett, 12 Gray, 227: "It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equaly true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the re-

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lation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." The same proposition is announced, and the authorities fully collated and examined, in Kedrick v. Manning, 1 De Gex. M & G. 176. To the same effect are Jones v. Lock, L. R. 1 Ch. 25, and Wason v. Colburn, 99 Mass. 342.

We think these cases announce the correct rule, and are decisive of the present controversy. The letters from the deceased to his sisters did not purport and were not intended to be an assignment of the policy, the title to which remained in the deceased. It was not an executed trust, but at most nothing more than a voluntary executory agreement to create a trust in futuro, and such agreements cannot be enforced in equity. This view of the case renders it unnecessary for us to decide whether the Probate Court had jurisdiction to enforce the trust, if it had been established.

Judgment reversed and case remanded for new trial

McKinstry, J., did not express an opinion.

STONE v. HACKETT.

12 Gray, 227.

Supreme Judicial Court of Massachusetts, 1858.

Bill in equity, in the nature of a bill of interpleader, to obtain the instructions of the court in the disposition of property held by the plaintiff under the following declaration of trust:

"This memorandum witnesseth that I have in my hands eighty-one shares in the Eastern Railroad, thirty-nine shares in the Eastern Railroad, New Hampshire, making in all one hundred and twenty shares; also fifty shares in the Fitchburg Railroad; all shares standing in the name of Harriet Kittredge or Harriet P. Kittredge, as trustee. The said several shares were purchased with the money of Dr. Rufus Kittredge of Portsmouth, New Hampshire, and are in my hands in trust for the following purposes and uses, that is to say, the income and dividends on said several shares are to be paid to the said Rufus Kittredge during his lifetime; and at his decease, twenty shares in the Fitchburg Railroad are to go to the Trustees of Donations for Education in Liberia in Africa; the remaining shares are to go, one-half to the American Board of Commissioners for Foreign Missions, the property to remain invested and the income to be used as specified in the act of incorporation; the other half to be given to the McLean Asylum, situated in Somerville, Massachusetts, and to remain invested, and the income to be used in aid of the support at the asylum of poor insane persons of the State of New Hampshire. Said Rufus Kittredge retaining the right to modify said uses or to revoke said trust. Ellen K. Stone.

The case was set down for hearing upon the bill and answers, and was as follows:

Dr. Kittredge in his will, executed on the 28th day of October, 1852, and confirmed by a codicil of the 1st of October, 1853, made provision for his wife, and bequests to many individuals and to the American Board of Commissioners for Foreign Missions, and constituted the Trustees of Donations for Education in Liberia his residuary devisees and legatees.

About the 1st of December, 1853, Dr. Kittredge, having previously purchased the stock mentioned in the above declaration of trust, and taken certificates thereof in the name of Harriet P. Kittredge, or Harriet Kittredge, trustee, (who had previously signed a declaration of trusts similar to this, and afterwards died), sent the certificates, with blank transfers endorsed upon them and signed by Harriet P. Kittredge, to the plaintiff, with the above declaration of trust, which he requested her to sign and return to him, and she did so. The plaintiff never paid any consideration for the shares, and the dividends thereon were paid to Dr. Kittredge during his life.

Dr. Kittredge died in February, 1854, without issue, and his will was admitted to probate in New Hampshire in April, 1854. He left property enough, besides the stocks mentioned in the declaration of trust, to pay and satisfy all the legacies and provisions of his will. His widow waived the provisions made for her in her husband's will, and claimed

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the share of his estate to which she was then entitled by the statute of New Hampshire, which provided that the widow of every man deceased testate, leaving no lineal descendant, should be entitled, beside her dower, to one-third of all his estate, after paying debts and expenses, if no provision was made for her in the will, or if she waived the provision. Rev. Sts. of N. H., c.165, § 8. Comp. Sts. c. 175, § 8.

After the death of Dr. Kittredge, and before filing this bill, the plaintiff filled up, as of date of December 1st, 1853, the blank transfers endorsed on the backs of the certificates of stock, and demanded new certificates; but the corporation declined to issue them.

The Massachusetts General Hospital in their answer insisted upon the validity of the declaration of trust, and claimed the portion of stock therein given to the McLean Asylum in Somerville, which was one department of their institution.

The widow answered that the stock enumerated in the declaration of trust was never transferred or dellvered to the plaintiff, and that such transfer, if made, was testamentary in its nature, designed to avoid the effects of the laws of New Hampshire, and, as to her, fradulent and void.

The executor of the will of Dr. Kittredge, the representatives of Harriet P. Kittredge, the American Board of Commissioners for Foreign Missions, the Trustees of Donations for Education in Liberia, and the railroad corporations, filed answers submitting their rights to the decision of the court, or suffered the bill to be taken for confessed against them.

Bigelow, J. The key to the solution of the question raised in this case is to be found in the equitable principle, now well established and uniformly acted on by courts of chancery, that a voluntary gift or cenveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or bona fide purchasers without notice. It is certainly true that a court of equlty will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.

The leading case in which this principle is declared and acted on is Ellison v. Ellison, 6 Ves. 656, in which Lord Eldon decreed the enforcement of a trust, which in its creation was wholly voluntary and without consideration. This has been followed by many other cases in which the same principles have been recognized. Pulvertoft v. Pulvertoft, 18 Ves. 84; Ex parte Pye, 18 Ves. 140; Sloan v. Cadogan, Sudg. Vend. & Purch. (11th ed.) 1119; Fortescue v. Barnett, 3 Myl & K. 36; Wheatley v. Purr, 1 Keen, 551; Blakely v. Brady, 2 Dru. & Walsh, 311; Browne v. Cavendish, 1 Jon. & Lat. 637; Kekewich v. Manning, 1 De Gex, Macn. & Gord. 176. The last named case contains a full discussion of all authorities, and a clear and accurate statement of the doctrine on the subject.

The application of the principle established by these authorities is entirely decisive of the rights and duties of the parties to this suit. The conveyance or transfer of the shares to the plaintiff in her capacity as trustee was full and complete and vested in her the legal title to the property. No further act was to be done by the original owner of the shares to consummate the plaintiff's title. As between the parties, the dellvery of the certificates of stock, with the assignments of some of them, and the power of attorney to transfer the others, was equivalent to a complete executed transfer of the shares. Nor is it at all material to the validity of the plaintiff's title, that the transfer of the shares had not been recorded in the books of the different corporations and new certificates of stock taken out by her. That was not necessary to the conveyance of the legal title as between the donor and the plaintiff. This is well settled by the authorities in this State. Quiner v. Marblehead Social Ins. Co. 10 Mass. 476; Essex Merrimack Bridge, 2 Pick. 248; Sargent v. Franklin Ins. Co., 8 Pick 96; Eames v.

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Wheeler, 19 Pick. 444. Such, too, is the plain import of the statute prescribing the mode of transfering shares in railroad corporations which provides that no conveyance of shares shall be valid "against any other persons than the grantors or their representatives," unless recorded as therein directed, clearly implying that no such record is necessary to pass the title as between the vendor and his personal representatives. Rev. Sts. c. 39, § 52. There was then a legal transfer of the property, fully executed to the plaintiff. There was also a full and explicit declaration of trust, executed by her and delivered to the grantor, by which she accepted the gift and took on herself the execution of the trusts which he intended to establish. Nothing, therefore, was left in fieri. The transaction was a completely executed transfer of the property, and fully created a trust, which, according to the principle already stated, a court of equity is bound to recognize and enforce.

It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property, because he retained a right to annul or revoke the trust. But this seems to us quite immaterial. A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust notwithstanding the existence of a right to revoke it. If this right is never exercised according to the terms in which it is reserved, as in the case at the bar, until after the death of the donor, it can have no effect on the validity of the trusts or the right of the trustees to hold the property.

Nor are we able to see any force in the suggestion that the trust which the donor created in some of its features looked to a disposition of the property which was the subject of the gift after his death. We know of no principle of law which renders such a transfer of property inter vivos invalid. The entire jus disponendi was in the donor. Perhaps if there were any facts to show that the transaction was intended to be testamentary in its character, and was entered into for the purpose of evading the provision of law regulating the execution of last wills and testaments, there might be some ground for impeaching the validity of the conveyance and withholding the sanction of the court from the trusts which the donor intended to establish. But it is not necessary to determine this question; because there is no evidence from which any such intent on the part of the donor in the present case can be inferred. The form of the transaction, and the trusts which were declared between the parties, afford no just ground for the inference that there was any collusion or fraudulent attempt by the donor to defeat the operation of the law of the State of New Hampshire or to deprive his widow of a fair share of his estate.

For these reasons we are of the opinion that a decree should be entered declaring the validity of the trusts set out in the bill, and directing the plaintiff to dispose of the property accordingly.

Decree accordingly.

DONALDSON v. DONALDSON.

Kay. 711

High Court of Chancery, 1854

Vice Chancellor Sir W. Page Wood.

In this case a question has been raised how far a deed of assignment, executed by Thomas Hudson, and dated the 29th day of June, 1850, by which he voluntarily assigned a large amount of property, consisting of various securities, to trustees upon certain trusts for the benefit of his donees, has been available to pass certain portions of the property included in the deed. The question has arisen between some of the parties claiming under the deed and the Crown, because the property which did not pass by the deed would be liable to probate and legacy duty, as passing by the settlor's will.

With respect to the great bulk of the property comprised in the deed, the counsel for the Crown has conceded that, as it stood in the funds and other securities in the name of the settlor, and as he has executed a declaration of trust contained in this deed, the relation of the trustee and cestui que trust has been created, so that this court will give effect to it. The real question arises with respect to the

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sum of £29,400 stock, which was standing in the names of the trustees of the settlor's marriage settlement in trust for himself. I do not think that the declaration of trust annexed to the description of this stock in the schedule is material. What I have to consider is, how far an assignment of this kind, of which no notice was given to the trustees in whose names this stock was standing, was effectual to pass the property therein to the trustees of the voluntary deed, so that this court would hold, as between the donees under that deed and the representatives of the assignor, that the title was complete. For the purposes of this question, it was necessary to consider the case of Kekewich v. Manning, 1 De G., M. & G. 176, in which the other decisions are reviewed and commented on by Lord Justice Knight Bruce, and which seemed to me, if I may use the expression, to stem the current of authority which had begun to set in adversely to these trusts, more especially since the decision in Edwards v. Jones. Ever since that case there has been considerably more difficulty as to how far a voluntary assignment of a chose in action does or does not confer a title on the donee. Looking through the cases, the principle which I gather from them is the same as that on which the Lord's Justices seem to have proceeded in Kekewich v. Manning, 1 De G., M. & G. 176, and though that case does not go so far as the present, I still think that this is concluded by it. In all the cases, except Beatson v. Beatson, and particularly in Ex parte Pye, it is laid down that, when there is complete declaration of trust by a party concerning stock or choses in action vested in himself, this court will enforce it. On the other hand, where there is a contract only, or an imperfect gift, which requires some other act to complete it on the part of the assignor or donor, the court will not interfere to require anything else to be done by him. The intermediate cases alone are difficult of solution. The question is, in every case, has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them without requiring any further act to be done by the assignor; and, if the title is so far complete that this court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him. In Beatson v. Beatson, 12 Sim. 291, alone there was an assignment of an equitable interest in stock, which was vested not in the donor but in a third party, and it was held that the court would not assist the volunteer. In Dillon v. Coppin, 4 My. & Cr. 647, stock standing in the donor's own name was assigned, and there this distinction was taken, which was somewhat nice, but still consistent with Ellison v. Ellison, 6 Ves. 656, and the other cases; namely, that, the stock being in the name of the donor himself, and there being no declaration of trust but a mere assignment, which would not pass the stock at all, and the deed showing an evident intention on the part of the assignor to do some further act, and containing a covenant to perfect the gift, the court said, we cannot call upon the donor to transfer the stock or complete the gift. But in the case of an assignment of the equitable interest in stock standing in the names of trustees, the deed of assignment passes the whole equitable interest of the donor, and the donee may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock; and I think that in such a case it would not even be necessary to make the donor a party to a suit to enforce the gift.

Then the question is, whether, notice not having been given to the trustees, the gift could be enforced. As to that, it has been said in some cases, that the gift is complete when no further act is required to be done by the donor or the donee; and that seems to imply a doubt whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true, that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original cestui que trust for whom they held it; and, if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to

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give notice to the trustees before the stock is transferred; and when he has given such notice, his title is complete: and, unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of this court against them. The fact that the trustees are themselves the executors of the donor in this case, I think, does not make any difference. As the donor has not obtained possession of the fund, the donees have a right to go to the trustees and require them to transfer the stock, or come to the court to have that done. The donees require no assistance from the court against the original assignor, and therefore the assignment is such as the court will support. That is the principle upon which cases like Sloane v. Cadogan proceed, and which Lord Cottenham seems to recognize in Edwards v. Jones, where he says: "In Sloane v. Cadogan the claim was not against the donor or his representatives for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees for the fund for the cestui que trusts." Sir W. Grant came to the conclusion that it did; and the consequence was, that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir W. Grant, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of the court. In this case, there is no need whatever for the donees to call in aid the jurisdiction of this court against the original assignor or his representatives. All that they have to do is, to require the trustees who hold the fund to transfer it to them.

This decision goes somewhat beyond all the authorities except Cadogan v. Sloane; but I cannot hold that the owner of an equitable interest in a chose in action is not entitled to assign it; and I think that, upon the principle recognized in Ellison v. Ellison, and like cases, I must decide that the equitable interest in this stock was effectually assigned by this deed.

RICHARDSON v. RICHARDSON.

L. R. 3 Eq. 686.

Equity Cases, 1867.

Sir W. Page Wood, V. C. The sole question in this case is, whether a legatee, under the will of the testator, Richard Richardson, of a sum of £1,250, ought not to submit to a deduction of £450 in respect to two promissory notes given by him to his sister, which involves the further question whether the testator was or was not the absolute owner of the notes. If he was the owner, though he demanded no interest upon the notes, and made no application for payment of them, yet as is conceded, the statute of limitations cannot be set up; and the plaintiff must be considered as having received, on account of his legacy, so much of the assets of the testator as his debt amounted to.

Whether or not the notes were the property of the testator depends upon a certain voluntary assignment, whereby the sister, shortly before her death, assigned the whole of her personal estate to her brother, the testator; and in the same instrument she gave him a power of attorney to ask, sue for, and recover the thereby assigned moneys and premises, and to do and execute such further acts and deeds as should be deemed necessary for deriving the full benefit of the assignment.

Now, there is no specific description in the deed of the promissory notes; and, if they passed at all, they passed under the description of "all the other personal estate and effects, whatsoever and wheresoever," of Elizabeth Richardson. She did not endorse the notes; and the defendants, the executors, by their answer, say they believe that, if she had not died so soon, the testator would have applied to her to endorse the notes, but she did not do so. The questions are: First, whether they passed by the deed at all; and, secondly, if they passed, whether they passed to the testator as trustee, or in his own right.

After the decision in Kekewich v. Manning, 1 D. M. & G. 176, I think it is impossible to contend that these notes did not pass by this instrument, because the

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rule laid down in that case, the decision in which was supported by reference to Ex parte Pye, was not confined merely to this, that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to be trustee of the property; but it amounts to this, that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust.

It is impossible to read the argument in that case, and the judgment of Lord Justice Knight Bruce, without seeing that his mind was directed to Meek v. Kettlewell, 1 Hare, 464, and that class of cases, where it had been held (such was the nicety upon which the decisions turned) that an actual assignment is nothing more than an agreement to assign in equity, because it merely passes such equitable interest as the assignor may have; and some further step must be taken by the assignee to acquire the legal interest. That further step being necessary, the assignment was held to be in truth nothing but an agreement to assign, and, being so, was not enforceable in this court,—the court having often decided that it will not enforce a mere voluntary agreement.

The distinction, undoubtedly, was very fine between that and a declaration of trust; and the good sense of the decision in Kekewich v. Manning, I think, lies in this, that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which affects to pass everything, independently of the legal estate. It was held in Kekewich v. Manning that such an instrument operates as an out-and-out assignment, disposing of the whole of the assignor's equitable interest, and that such a declaration of trust is as good a form as any that can be devised. The expression used by the Lord Justices is this: "A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument."

In that case, reference was made in the argument, principally to the case of Ex parte Pye, which was a decision of Lord Eldon to the same effect. Reliance is often placed on the circumstance that the assignor has done all he can,—and that there is nothing remaining for him to do; and it is contended that he must, in that case only, be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for, if there be an actual declaration of trust, although the assignor has not done all that he could do,—for example, although he has not given notice to the assignee,—yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: Aye or no, has he constituted himself a trustee?

In Ex parte Pye, the testator had written to one Dubost, authorizing him to purchase in France an annuity for the benefit of a lady named Garos, for her life, with power to draw on him for £1,500 for such purchase. The agent, finding that the lady was a married woman, exercised his own discretion, and bought the annuity in the name of the testator. Then, shortly before his death, the testator sent to Dubost, by his desire, a power of attorney authorizing him to transfer the annuity to the lady. The testator died before anything more was done; and, after his death, the annuity was transferred. There was a question whether, by the law of France, the exercise of a power of attorney by the person to whom it is given, without knowledge of the death of his principal, is good. I think the Master found that it was so; but Lord Eldon expressly declined to reply upon that, as he says in his judgment: "These petitions" (the question came on upon petition) "call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the court. With regard to the French annuity, the Master has stated his opinion as to the French law,—perhaps without sufficient authority, or sufficient inquiry into the effect of it,—as applicable to the precise circumstances of this case, but it is not necessary to

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pursue that, as upon the documents before me it does appear that, though in one sense this may be represented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant."

BROWN v. BROWN.

174 Mass. 197.

Supreme Judicial Court of Massachusetts,

1899.

Appeal, by the administrator of the estate of Jennie M. Brown, from a decree of the Probate Court, disallowing certain items in his account. Hearing before Barker, J., who affirmed the decree, and the appellant appealed to the full court. The facts appear in the opinion.

Hammond, J.—This is an appeal from a decree of a single justice disallowing certain credits in the probate account of the appellant as administrator of his wife's estate.

There is no report of findings of fact or of rulings of law, but the case is before us upon the evidence, wholly oral, which was taken at the hearing. In such cases it is settled that the decision of the single justice on questions of fact will not be reversed unless it clearly appears to be erroneous, and, as it is not to be assumed that his rulings of law are erroneous, it follows that if the decree is warranted by any reasonable view of the evidence it is to stand. Montgomery v. Pickering, 116 Mass. 227; Slack v. Slack, 123 Mass. 443.

The items in dispute are four, namely, a deposit in the Suffolk Savings Bank, a deposit in the Provident Institution for Savings, a note of Alexander Williams, Jr. and Company, and two United States bonds; and the only question is whether the property represented by these items was the property of the wife at the time of her decease.

We think the evidence would warrant a finding of facts as follows: The appellant and intestate were married in 1871, came to Boston shortly afterwards, and lived here until she died in April, 1895. At the time of her marriage she had a daughter by her former husband, from whom she had been divorced. The appellant and his wife were of frugal habits, and he managed to save a considerable part of his earnings. His habit was to share these savings with his wife, keeping one-half for himself, and providing the other half should go to her as her own money, to do with as she saw fit, his intention being to convey it absolutely to his wife. The case raises the question whether this intention was so far carried out as to make the title of the wife complete during coverture.

Although in this Commonwealth there has been much change in the law regarding the relations of husband and wife and the power of a married woman to acquire property and make contracts, yet it is still the law here that, with certain exceptions as to wearing apparel and similar articles not material to this case, a married woman can not acquire property by gift from her husband, though such a gift may be so far valid as to give the wife a right to the property at the death of her husband as against his heirs or executors but not against his creditors. Property thus given remains the property of the husband during his life, and may be demanded by him or attached by his creditors. Pub. Sts. c. 147, § 3. Spelman v. Aldrich, 126 Mass. 113; Thomson v. O'Sullivan, 6 Allen, 303; Marshall v. Jaquith, 134 Mass. 138; Simpson v. Achorn, 158 Mass. 342.

But this rule of law is applicable only in the case of direct gifts, and does not prevent the transfer of property from the husband to the wife through a third person. Perhaps the most familiar illustration is where a conveyance of real estate is made by the husband to a third person and by him to the wife. Such a conveyance passes to the wife a valid and complete title to the land, although the sole purpose of the transaction is thus to pass the title, and there is no consideration moving from or to either of the parties, and the third party is a mere conduit for the passing of the title. Mott v. Alger, 15 Gray, 332. A husband may give and deliver personal property to a third person, who may straightway give and deliver the property to the wife; and this would be a

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valid transfer of the property from husband to wife, although the sole purpose of all parties was to make such transfer. But the gift cannot be made directly. There must be some contract between the husband and a third party, and between the third party and the wife, and the title of the wife must come by contract with that third party. If it appears that the title comes to her by such contract, then it is good, if not fraudulent as to creditors, although the only consideration for the contract moves from the husband. Sweeney v. Boston Five Cents Savings Bank, 116 Mass. 384; Porter v. Wakefield, 146 Mass. 25, 27. But if the contract be made with the husband in the shape of a promissory note or a check, even if payable to the wife, and this instrument is given by the husband to the wife directly, then the gift is not good. Spelman v. Aldrich, 126 Mass. 113.

It becomes therefore necessary to inquire whether whatever title the wife had to this property came to her by a direct gift from her husband or by a contract with some third party. If by a direct gift from her husband, then no irrevocable title passed, and, as she did not survive him, he took it at her death. If, however, the title came by some contract with a third person, then, to her through the latter as a conduit, there is no principle of law which would prevent it from so passing, although the consideration moved entirely from the husband, and the contract with the third party was in accordance with the original agreement between him and the husband that it should be made, and all was one entire transaction.

We think that upon the evidence in the case a finding may be made either way on this question. But we are not to assume that the justice made any erroneous ruling of law, and if the evidence justified any finding which will support the decision, then the decision may be sustained.

As to the deposits in the savings banks we think the evidence would justify the finding of the following facts. The husband desired that one-half of his earnings should go to his wife to be her own property, and he intended so to transact matters as legally to carry out that intention. And in pursuance of that intention he and his wife each had a bank book for the same amount. The wife carried the most of the money to the bank. Her own bank book was sometimes in her possession and sometimes in his, but when in his possession was kept by him for her as her agent. The money deposited in the savings banks by the wife was placed in her hands by her husband, with the understanding that it should be so deposited as to be hers, and that the business should be so done as legally to carry out that intent. She carried the money to the banks under those instructions. She had the deposits made in her name, and it may be assumed that when she obtained a bank book she signed the register at the bank; but whether she did so or not, the delivery of the bank book to her was the evidence of the contract between her and the bank, which was in substance to hold a sum of money for her and to be answerable to her for it. She thereafterwards, with the full knowledge and consent of her husband and in accordance with his original intention, claimed this money as hers and treated it as such; and they both supposed it was hers.

If the wife as the agent of her husband received this money from his hands, and as his agent delivered it while still his to the bank, and, still acting as his agent, directed the bank upon receiving the money to make a contract with the wife to deliver a like amount to her, and the bank, taking the money from her as the agent of her husband, did, in compliance with the directions given by her as such agent, thereupon deliver to the wife, acting in her individual capacity, the bank book made out in her name, then the bank has made a contract with the wife, and her title to the account is good. She gets a title not by gift from the husband but by contract with the bank, and the account is hers. And we are of opinion that the evidence would warrant a finding that in making the deposits she did thus act as his agent, and that in receiving the bank book she did thus act in her individual capacity, and in this way the real intentions of both husband and wife are carried out according to law. Her agency for her husband

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continued up to the time the title to the money passed to the bank, and then the bank makes the contract with her as an individual.

In this aspect of the case it is distinguishable from Spelman v. Aldrich, 126 Mass. 113, and similar cases, where the gift from the husband to wife is direct and before the deposit is made in the bank.

Of course if the gift is directly to the wife, she acquires no title no matter what she may afterwards do with the property.

And the same principle applies to the Williams note. In the settlement with Chamberlain and Company the husband received $8,000. The settlement was made by giving him a check for $4,000 payable to him, and one for $4,000 payable to his wife. These two checks were deposited in the Boston Safe Deposit and Trust Company on two accounts, one to the account of his wife and one to his own account. These checks were received in accord and satisfaction of the claim of the husband, and the check to the wife became hers upon delivery to her. We think the evidence would warrant a finding that the business was conducted in that way. When she subsequently drew out the money and lent it to Williams, it still remained hers.

As to the bonds the court may have found that they were purchased by the money of the wife.

The exception to the exclusion of the evidence was waived at the argnment.

Decree affirmed.

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REAL PROPERTY CASES

FEB.

LEMON v. GRAHAM.

131 Pennsylvania State, 447.—1889.

Ejectment. Plaintiff was nonsuited below. The facts appear in the opinion.

Williams, J.—The title to the land in controversy was, in 1886, vested in James Ramsey, under whom both parties claim. In August of that year he made an assignment to his son, Allen Ramsey, which was written on the back of the deed under which he acquired title, and delivered the paper on which the deed and the assignment were written to his son. The assignment was in these words:

"I, James Ramsey, do hereby assign and set over all my right, title, claim, interest, property, and demand whatsoever in and to the within deed unto Allen Ramsey, for value received. Witness my hand and seal this 3d day of August, 1866. James Ramsey. (Seal.)

"Attest: George Bish."

Eighteen years later, in 1884, he conveyed the same land by deed to his daughter, Elizabeth Jane Graham. The father was in possession until his death. Allen Ramsey died before his father. This action was brought by the heirs at law of Allen. The defense alleges that Allen took only a life estate in the land, under the assignment made by his father to him, and that on his death his title was extinguished, the fee having passed to Mrs. Graham under the deed made to her in 1884.

Two questions were raised on the trial, and are now for determination. The first relates to the construction and legal effect of the assignment to Allen Ramsey. The other is over the right of the plaintiffs to show by George Bish, the scrivener by whom the assignment was drawn, and the subscribing witness to its execution, what the parties intended and agreed upon, what they asked him to put in writing, and what he undertook to do for them. The learned judge of the court below held that the assignment conveyed only a life estate, and that evidence offered to show that a fee-simple was intended, and that the failure of the scrivener was by mistake of his own, was incompetent.

We do not doubt the general rule laid down by the learned judge, that the word "heirs," or its equivalent, is necessary in a deed in order to vest a fee-simple in the grantee. The rule is as old as the common law, and, as applicable to a formal deed, is well understood, and constantly applied. It is the invariable practice of professional conveyancers to describe the estate which it is intended to convey, by apt words. If it is a fee, the words of inheritance are introduced. If it is for the life of the grantee or of another, the character and duration of the estate are clearly set forth. Instruments having no apt words of description in them are not often met with, but when encountered are found, like the one before us, to be the work of men who have no professional training, and no knowledge of the principles of conveyancing. They are almost always intended to convey a fee-simple, and fail to do so because of the omission of the necessary technical words, the importance of which was unknown to the scrivener and to the parties. It is for this reason that the courts have relieved against the mistakes so made, when the proofs were sufficient to justify them in so doing. and have applied the general rule only to such cases as came clearly within its operation. Thus, the courts both in England and in this country have held that the word "heirs" was not necessary to pass an absolute estate in fee when there was a gift by will, but that the intent to vest a fee may be gathered from the will as a whole. Little's App., 81 Pa. 190. So it has been held that an executory contract without words of inheritance will pass a fee-simple in equity. Ogden v. Brown, 33 Pa. 247. And it was held in the case last cited that the effect of an informal instrument transferring an interest in real estate depends, not on any particular words or phrases found in it, but on the intention of the parties as collected from the whole instrument. This case was followed in the recent case of Dreisbach v. Serfass, 126 Pa. 32.

But the effort to avoid the rigor of the

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rule where its application is not obligatory began long ago. Where technical words are supplied by reference to another instrument which contains them, the case was recognized as an exception as early as the days of Lord Coke; and this exception was recognized by our own case of Lytle v. Lytle, 10 W. 259, and followed. The rule was plainly laid down in the last case cited that a fee simple may be created in Pennsylvania, by deed without words of inheritance, by a reference to another instrument in which such words are found, and it was made clear that such was the rule in England at a very early date. The following examples are from Shepherd's Touchstone. A conveyance was made by deed in which the grantor recited that "B. hath enfeoffed him (the grantor), of white acre, to have and to hold to him and his heirs, . . . and that as fully as B. has given white acre to him and his heirs, he doth grant the same to C." Here the word "heirs" is supplied in the grant to C. by the reference to the grant from B., and C. takes a fee-simple without the appearance of words of inheritance in the grant to him. Another case is that of a grant of two acres of land "to have and to hold, the one acre to A. and his heirs, and the other acre to B. in forma predicta." Shep. Touch. 101. Here B. takes a fee-simple by virtue of the reference to the grant to A., in which words of inheritance appear. The reference shows the intent of the grantor, and is held to import the words of inheritance into the grant to B.

In the light of these cases, let us look once more at the assignment before us. We find the assignor held a deed in fee-simple, in the usual form, made in 1862 by another son, John. On the back of this deed the assignment is written. It refers for a description of the estate granted to the terms of the deed upon which it is indorsed, and professes to transfer to the assignee all the right, title, interest, property, claim, and demand of the assignor "in and to the within deed." What was the title of the assignor? That question can only be answered by an examination of the description of it in the body of the deed; but, whatever it was, the assignor undertakes to transfer it to his assignee. Not a part of it; not a life estate carved out of it, but "all the right, title, interest, property, claim, and demand" of the assignor. Nothing was left. He transferred his whole estate, as vested in him by virtue of the deed, by the reference to its terms in the assignment. He said, in substance and in legal effect, "as fully as the within deed clothes me with the title to the land described in it, so fully and completely do I transfer the same land to my son Allen. He is to take from me the title which I took from my grantor." The technical words that are wanting in the assignment standing by itself, are thus supplied by the reference to "the within deed" for a description of the estate; and the fee-simple which the father took by the deed from John he transfers by his assignment to Allen. This is what was intended; and the scrivener wrought better than he knew in making his reference to "the within deed" for a description of the "right, title, estate, interest, property, claim and demand" of the assignor. If Allen bought a life estate only, it is reasonable to suppose that he would have taken possession; but he left his father in possession, and in the full enjoyment of its proceeds. If the father understood that he parted with a life estate only, and retained the fee, he would naturally keep the deed under which he acquired title; but he indorsed his assignment upon that deed, and delivered it so indorsed, to Allen. We are satisfied, therefore, that the parties intended just what our construction of the assignment shows they did, viz., to convey the fee-simple to Allen. In this view of the case, it becomes unnecessary to consider the other question at any length.

The judgment is reversed, and a venire facias de novo awarded.

FISHER v. FIELDS.

10 Johnson (N. Y.), 495.—1812.

Bill in equity to restrain Fields from prosecuting an action at law in ejectment and to compel him to convey to Fisher the lands in dispute. The bill was dismissed by the court below. Plaintiff ap-

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peals. The further facts appear in the opinion.

Kent, Ch. J.—The appellants claim title to lot No. fifty-seven, in Aurelius, under a deed from Benjamin Griffen, the soldier who drew the lot, and in whose name the patent issued. This deed was made on the 27th of March, 1784, and was drawn on the back of the original discharge, and though no consideration was expressed in the deed, yet the appellants have averred and proved a valuable consideration given. The respondent claims under a subsequent conveyance from the same soldier; and the sole question is whether the appellants are entitled, under the first deed to the relief prayed for by their bill.

It is not pretended that the respondent is a bona fide purchaser without notice. It is in proof that he purchased with a knowledge of the assignment to Birch, under whom the appellants claim; but the defence is that the soldier's deed to Birch was not sufficient, in law or equity, to entitle him to the land, or, at least, to any greater interest than a life estate.

The Onondaga commissioners appear to have thought otherwise; for they awarded that the equitable title was in the appellants, and that the respondent held in trust for them. After a careful consideration of the case I am of the same opinion.

When the soldier assigned over his right to Birch, in 1784, he had no legal title. He had only an equitable claim upon the state, founded upon the concurrent resolution of the Legislature of March, 1783. It was not requisite, therefore, that he should make use of the same formal and technical conveyance that would have been proper, if he was conveying an estate in fee. It was only an assignment of an equitable interest, and it was sufficient if he used words that denoted clearly and explicitly his intention. The deed here was on the back of his discharge, and it is declared that Birch was entitled to all the lands that he was entitled to, either from the state or continent, for his services as a soldier. This was a full declaration of trust. No person could possibly mistake its meaning; and there is no just pretense that it was not fairly procured, and for a price that was, at that day, deemed an adequate consideration. It is probable that a large portion of the titles to the military lands were originally assigned in the same brief manner. It was an authority to the assignee to receive the patent to his own use; and if the law had not afterwards directed the letters patent to issue, in all cases, in the name of the soldier, this authority would no doubt have been deemed sufficient to have procured the patent in the name of Birch, or his assignee. The issuing of the patent in the name of the soldier did not invalidate the equitable claim of Birch; for the soldier took it as trustee to the party to whom the equitable interest had been transferred.

The act of the 6th of April, 1790, expressly provided that "all grants, bargains, sales, devises and other dispositions" of the land made by the soldier, before the issuing of the patent, should be deemed valid. It also declared that the patent should have a retrospective effect, and that the land should be deemed to have vested in the patentee and his heirs, from the 27th of March, 1783. The act of the 5th of April, 1803, went still further, and declared that the lands should be deemed to have been vested in the soldier at the time of his death, though he died before the 27th of March, 1783. These statutes were made not to divest, but to confirm and enlarge the interest which the soldier may have passed before the date of the patent. The statutes were made for the benefit of purchasers, and to render their titles valid in a court of law, equally as if the soldier had been seized in fee at the time of the conveyance. And courts of law, when any such conveyances are brought before them, are to give them the same operation as if they had been executed by the party seized; and such has been the decision of the Supreme Court.

But these statutes never meant to weaken or defeat any equitable trust which may have been created by any deed competent to raise such a trust, though incompetent to convey the fee at law. The Court of Chancery has exclusive cognizance of cases of trust, and is charged with the duty of seeing them fulfilled and in doing so it acts in furtherance of the liberal provisions and inter-

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est of the statutes. Suppose that Griffen, instead of the deed in question, had executed a bond to Birch, and bound himself, by the consideration which it is proved he received, to convey that interest to Birch, or such other person as Birch should appoint, would not equity compel him to execute that trust? Most undoubtedly; and so it was decided in a case which I shall presently mention.

There never was a greater mistake, as I apprehend, than the supposition that this transfer of the soldier's right to Birch is to be tested by the strict technical rules of a conveyance of land at common law, and that Burch did not take the whole interest of the soldier, because the word heirs was not inserted in the assignment.

If Griffen, at the time, had been seized in fee of the land, as an estate at law, the argument would have had weight. But surely that formality was not necessary to pass a mere undefined claim upon the government, for Griffen had nothing else to convey but an interest in trust. That would be contrary to all the rules relative to the creation or assignment of a trust. The act of 28th February, 1789, on this very subject, is sufficient to justify a contrary conclusion; for that act directs the commissioners of the land office to require from each soldier entitled to bounty lands, an assignment of his claim to lands under any act of congress, to the surveyor-general, for the use of the people of this State. There is no particular form of an assignment given, nor anything intimated about a conveyance with the usual and apt words of inheritance. No doubt such an assignment, as the one in this case, would have been deemed sufficient to vest this State with the interest in the soldier's claim upon congress, and I am persuaded, that if the facts were investigated, no more formal assignments were taken

It is a well-settled principle that no particular form of words is requisite to create a trust. The intent is what the courts look to. 2 Fonb. 36, note; 3 Ves. Jr. 9. A trustee or cestui que trust will take a fee without the word heirs, when a less estate will not be sufficient to satisfy the purposes of the trust. This has been frequently ruled in chancery, and the Court of K. B., during the time of Lord Mansfield, made the same decision at law. 2 Atk. 72, 578; 1 Ves. 491; Amb. 93; 3 Burr. 1684. In Moorecroft v. Dowding, 2 P. Wms. 314, A. purchased an estate in the name of a third person, who gave a bond to convey it to such person and uses as A. should appoint; and the lord chancellor held that the third person was a trustee to A., who had, in equity, a specific right to the land, and he was decreed to convey. Here, a bond was held sufficient to create a trust in fee. But what puts this point beyond all doubt, is the doctrine of the common law on the subject of uses and trusts. Before the statute of uses, if a man had bargained and sold his land for a valuable consideration without inserting the word heirs, the Court of Chancery would have decreed an execution of the use in fee, because the use was merely in trust and confidence, and because this was according to the conscience and intent of the parties. But, after the statute of 27 Hen. VIII., as the uses were transferred and made a legal estate, a different rule took place. 1 Co. 87 b., 100 b. A trust is merely what a use was before the statute of uses. It is an interest resting in conscience and equity, and the same rules apply to trusts in chancery now which were formally applied to uses. And, in exercising its jurisdiction over executory trusts, the Court of Chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party. This principle seems to be well established, and it has been ably vindicated by Fonblanque. Vol. 1, 396 note, 400 note; vol. 2, 18.

To apply, then, this doctrine to the present case; the soldier, after the assignment of his claim upon the State to Birch, and after the issuing of a patent in his name, became seized in trust for Birch, or those to whom Birch had assigned his interest; and instead of dismissing the appellant's bill, the Court of Chancery ought to have decreed an adequate legal conveyance to be made by the delendant to the appellants. The defendant purchased of Griffen knowing of the assignment, and, therefore, he was a purchaser chargeable with the trust, and as much bound to execute the trusts as the soldier himself. The clearest justice, and clearest principles of a court of equity are in favor of such a decree.

A good deal was said, upon the argu-

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ment about the statute of frauds, but it appears to me that the objection is wholly inapplicable. This is not a case of an agreement about the sale of lands; it is a complete assignment by deed of an equitable claim; and the 12th section of the acts (Sess. 10, c. 44), says, that all declarations or creations of trust, or confidence, of any lands, shall be proved by some writing, signed by the party enabled to declare the trust.

Judgment of reversal.

MORRISON v. SEMPLE.

6 Binney (Pa.) 94.—1813.

Ejectment brought by the guardian of Edward and Sarah Semple against Morrison and others.

One Samuel Semple left a last will and testament by which he gave all his "real and personal property" to Steele Semple, under whom defendants below (Morrison and others) claim. Plaintiffs below claim the land in question as heirs of Samuel Semple, asserting that Steele Semple (who is now dead) took only a life estate therein. The judgment below was for the Semples. Morrison appeals.

Tilghman, C. J.—Judgment was entered in this case, in the Court of Common Pleas, without arguments and by consent, in order that it might be brought up for the opinion of this court. The question is, whether an estate for life or in fee passed to Steele Semple by the will of Samuel Semple. The will is very short and in the following terms: (Here the Chief Justice read the will.) The counsel for the defendant in error placed this case in as strong a light as it would bear, but I have never entertained a doubt on the subject. In whatever point of view it is considered, I perceive a plain intention with apt words to pass a fee simple. Here is a testator with an only child (a daughter), who had a husband and two children. He makes no mention either of child or grandchild, but speaking of his son-in-law in the most affectionate manner, he gives him the whole of his real and personal property, and appoints him his sole executor. What can be concluded from this, but that the testator placing unbounded confidence in the husband intended to put every thing in his power. It is inconceivable that with any other intent, he should have observed a profound silence with respect to every other human being. It is a singular instance of confidence, but does not prove that the testator had no affection for his daughter or her issue. It proves that he was convinced of the honor and integrity of his son-in-law, and to an honorable and upright mind no obligation could be stronger than that which this will imposed. What is its language? "I place every thing that is dear to me in your hands. The person and the fortune of my child are confided to you. I know that you will prove worthy of the trust." But it is said that intention alone is not sufficient. The heir is not to be disinherited without words sufficient to pass the estate to some other person. It is true that we are not permitted to guess at the intention; it must be ascertained from the words of the will. But if it can be so ascertained it shall be carried into effect. No technical words are necessary to pass a fee simple. Any expressions which show an intent to give an absolute estate are sufficient. A devise of land to one forever, or "to dispose of at his will and pleasure," is a fee; because there is a manifest intent to give a fee. So a devise of one's estate, or of all one's right or interest in land passes a fee for the same reason. The rule is this: Words which only describe the object devised give no more than estate for life, but words which comprehend the quantum of the estate, pass the fee. And this rule is not founded on auy artificial principle, but on the plain ground of common sense and fair construction. When a man gives all his estate, it is as much as to say, all the interest that he has in the subject devised. In the present instance the testator designates no particular object, but gives in general, all his real and personal property. I can conceive no expressions more comprehensive. The giving of the real and personal property by the same words, shows an intent to give the same interest in both, that is to say, an absolute interest, for no man ever doubted that those expressions give an absolute interest in personal property. Property signifies the right or interest which one has in land or chattels. In this sense it is used by the learned and unlearned, by men of all ranks and conditions. We find it so defined in diction-

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aries, and so understood by the best authors. The possession of land may be in one man, the property in another. There is a right of possession, and a right of property. Every scrivener who draws a conveyance, mentions not only the land itself, but also "the right, title, interest and property of the grantor of, in, and to the same." In common conversation we say that such a house or piece of land is the property of such a person. When, therefore, a man devises all his real property, he devises all the right and interest which he has in any lands or real estate. If he has a right in fee simple a fee passes, otherwise the will is not complied with; for if the devisee takes but an estate for life, he does not take all but only part of the devisor's property. Many cases were cited on the argument. I think it unnecessary to take particular notice of any of them. It is a principle undeniable, that when the words of a will indicate an intention to pass the whole interest of the devisor, the devisee shall take a fee. Being clearly of opinion that such an intention is indicated by the expressions of this will, it folows that Steele Stemple took an estate in fee in all the real estate of Samuel Semple. The judgment of the Court of Common Pleas must, therefore, be reversed, and judgment entered for the plaintiffs in error.

WARNER v. TANNER.
38 Ohio State, 118.—1882.

Action by Warner as administrator of L. Bartlett, deceased, for the value of a lease alleged to have been converted by Tanner to his own use.

In 1864 Tanner leased to Bartlett certain premises, Bartlett to build a cheese house thereon and to pay for the use of said premises thirty dollars per annum "while said premises shall be used as and for manufacturing cheese; and when said premises shall no longer be used for such purpose, the premises . . . shall again revert to said Tanner, said Bartlett having the privilege of removing all buildings and fixtures put upon said premises by him." Bartlett came into possession under the lease and so continued until his death in 1874, at which time rent was paid to February 1, 1875.

In February, 1875, Tanner (having previously requested the administrator to remove the buildings and fixtures) went into possession of the premises against the protest of Warner, who thereupon brought this suit. Judgment on the verdict for plaintiff was reversed by the District Court. The administrator brings error to this court.

Okey, C. J. —In the court of Common Pleas, the jury was charged, that the instrument executed by the parties was not a lease at will, nor for years, nor of perpetual duration; "that said lease is not real property;" that it "was a lease which continued and run for an indefinite period, and so long as the lessee, or his assigns or personal representatives, should use the property covered by said lease for the purpose of manufacturing cheese thereon;" that upon the death of Bartlett, the interest passed to the administrator and not his heir; and that the administrator could maintain a suit against the Tanners in the nature of an action of trover for the conversion of the fixtures and the lease. To state such a position is to refute it. The only instnace of a similar action which I remember was met in Railroad Co. v. Robbins, 35 Ohio St. 531.

Leases may be at will, for years, for life, or for perpetual duration, Foltz v. Huntley, 7 Wend. 210; Taylor's Land, & T., § 72. Indeed, they may be made for any period which will not exceed the interest of the lessor in the premises. And whatever the term, it may be subject to a condition which is a qualification annexed to the estate by the grantor, Sperry v. Pond, 5 Ohio 387, s. c., 24 Am. Dec. 296, or lessor, Foltz v. Huntley, supra, whereby the estate or term granted may, among other things, be defeated or terminated.

In this case the question as to the rights and interest which Bartlett acquired under the instrument, is one of construction. The fact that he was required to and did place upon the premises valuable structures, which he could only remove when the premises were no longer used for the manufacture of cheese thereon, satisfies us that this was not a lease at will nor a lease from year to year. On the other hand, the instrument contains no words indicating an intention to grant a fee in the premises; and yet the construction which the Court of Common Pleas placed upon it would render it, in effect, precisely the same as

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though the grant had been to Bartlett, his heirs and assigns. It would endure, according to that construction, until the premises were no longer used for the manufacture of cheese, or the lessee ceased to pay rent precisely as in the case of a grant in fee with such condition. Having regard to the whole instrument, and not overlooking the fact that the right to remove the fixtures is, in terms, limited to Bartlett, we are satisfied that a lease for life was granted to him, subject to be defeated when the premises were no longer used for the manufacture of cheese thereon, or by the non-payment of rent. Hurd v. Cushing, 7 Pick. 169, Sperry v. Pond, supra; Foltz v. Huntley, supra; Rowle's Case, Tudor's Lead. Cas. Real Prop. 2d ed. 27-100; 4 Wait's Act. & Def. 502. Indeed, it is well settled that if one grant an estate to a man and woman during coverture, or long as the grantee or lessee shall dwell in such a house or use the premises for a specified purpose, as for instance, the manufacture of cheese thereon, or for any like uncertain time, the grantee or lessee has in judgment of law a freehold. 1 William on Ex. (6 Am. ed.) 749; Taylor's L. & T., § 52; Beeson, App., Burton res. 12 C. B. (74 E. C. L.) 647; and see cases cited, supra. The cases relied on by the plaintiff in error White v. Fuller, 38 Vt. 194; Lewis v. Effinger, 30 Pa St. 281; Cook v. Bisbee, 18 Pick. 527, are in no respect inconsistent with the view here stated; and the statutes and decisions relating to permanent leasehold estates in this state, which are also cited and relied upon by the plaintiff in error, shed little light on the case.

The administrator of Bartlett had no right of action, except with respect to property merely personal, which may have remained on the premises when this suit was brought; nor had he a right of action with respect to such personal property, unless the Tanners converted it to their own use. Leases of land of a chattel quality are chattels real, and go to the administrator; in other words, all interests for a definite space, measured by years, months or days, are deemed chattels, interests, and, independently of statutory provisions, Northern Bank v. Roosa, 13 Ohio, 334, 30 Ohio St. 285, go to the administrator; but he has no interest in a lease, like this, for a freehold term. See authorities cited in the last paragraph.

Judgment affirmed.

FEB.

ATKINSON v. BAKER.

4 Durnford & East (Eng.) 229,—1791

Detinue to recover certain deeds.

One Foster being seized of a life estate in certain lands conveyed them to one Williams and his heirs, who took in trust for W. Atkinson, his heirs, executors and assigns. Atkinson received the deeds of the premises. On his death they came into the possession of his heir-at-law Baker. Plaintiff, as administrator of Atkinson, brings this action to recover them. Defendant demurred insisting that plaintiff was not entitled to the deeds, plaintiff was not entitled to the deeds, the defendant being a special occupant of the estate. It was further stated that prior to the statute, 29 Car. 2, c. 3, every estate pur autre vie of which there was no special occupant marked out by the grant, belonged to the person who first took possession of it. "But this being found inconvenient, that statute was passed to remedy it; and it enables the proprietor to devise it, and enacts, That if no devise be made it shall be chargeable in the hands of the heir, if it comes to him by reason of a special occupancy, as assets by descent, as in case of land in fee simple; and in case there is no special occupant, it shall go to the executor or administrator and be assets in their hands." In case of a surplus, if not devised and there be no special occupant, by 14 Geo. 2, c. 20, § 9, such surplus is distributed as personalty. "Now these statutes only apply in cases of abstract possession; but here there is a special occupant."

On the other side it was urged among other points that though the heir is favored over the devisee, "Yet he is not favored under the statute of frauds," and that if this estate vested in the heir it would only be liable to specialty debts, whereas if the administrator were entitled, he would hold it for all the creditors of the intestate."

LORD Kenyon. Ch. J.—The law on this subject has been truly stated by the defendant's counsel. If an estate pur autre

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vie be limited to a man, his heirs and assigns, and if it be not devised, it goes to the heirs, under the statute of frauds, and is liable to the same debts as a fee simple is. Where it is granted to a person, his executors, administrators, and assigns, the executors take it subject to the same debts as personalty of any other description is; and by the 14 Geo. 2, it is distributable. Now in this case, before the plaintiff can recover the deeds in question, she must show a title to the estate in respect of which she claims the deeds; but she objects to the defendant's retaining them, because his title, if any, is only equitable and cannot be inquired into in a court of law. Now, this court either has or has not a right to inquire in whom the equitable title is vested; and in either way of considering the question there must be judgment against the plaintiff. If it be so doubtful a point that we canot decide it in a court of law, the plaintiff must seek redress in equity; because the right to these documents must follow the title to the etsate, and if we can examine into the title the defendant, who is the heir at law of the tenant pur autre vie, must have judgment. The estate in question was conveyed to Williams, his heirs and assigns; and it appears by the deed of trust, which, as being a declaration in writing, is valid by the statute of frauds, that Williams held the estate in trust for Atkinson, his heirs, executors, administrators, and assigns. The first limitation is to the heirs; and in the ordinary course of this species of property it goes to the heir at law, because it is a real estate. Then it is urged, that we ought to exclude the heir, in order to let in a more numerous class of creditors; but however convenient it might be if such were the law, when we are deciding according to law, we must take care not to infringe one of its first rules; and here the heir at law is entitled to the estate as a special occupant; and has consequently a right to detain the possession of those documents which belong to the etsate.

Judgment for the defendant.

REYBURN v. WALLACE.

93 Mississippi 326—1887.

Black, J.—This case is here on an appeal from the judgment of the Circuit Court sustaining a demurrer to the petition. The petition, which is a bill in equity, in substance, states that Mrs. Reyburn, the wife of the plaintiff, died in 1879, seized of a large real estate situate in St. Louis; that she left surviving her one child, five years old, and her husband, the plaintiff, who was twenty-eight years of age; that, by her will she devised her real estate to her husband for life, in case he should remain unmarried but in case of his marriage, then to her heirs, and if she had no heirs at his death, then to her sisters and their children in case of the death of any of them; that the property is to a large extent unproductive, and the improvements not adapted to the neighborhood in which they are situated; that the annual rents received are some fifty-eight hundred dollars, and the repairs, insurance and general taxes reduce this amount to about three thousand dollars. The petition then shows that four of the streets upon which the property abuts have been, and are being, reconstructed by taking up the old pavement, renewing and readjusting the curbing, and paving the roadway with granite blocks laid on a concrete foundation; and that two other streets have been, and are being. reconstructed in like manner, save that the roadway is paved with asphalt on concrete foundation. For the work thus done tax bills are issued, which are a lien upon the property abutting upon the street. Plaintiff has paid the tax bills issued, amounting to thirty-seven hundred dollars, and others will be issued to the amount of thirty-five hundred dollars. It is alleged that the property is, and will be, greatly enhanced by the improvements. The plaintiff and his deceased wife, and all other persons having a contingent interest in the property are made defendants. The prayer of the petition is that a portion of the unproductive property be sold to pay the unpaid tax bills, and to refund to plaintiff the amount he has paid in excess of twenty-seven per centum.

The only question is, whether plaintiff, as owner of the life estate, should pay the whole of these taxes, or whether they should be apportioned between him and those entitled to the same in remainder.

The tenant for life is bound to pay the interest on incumbrances on the property

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out of rents and profits; but if he pay off the incumbrances it is said that he is, prima facie, a creditor of the estate for the amount paid, deducting the interest he would have had to pay as life tenant during his life. 4 Kent, 74; 1 Wash. Real Prop. (3d ed.) 110. He must pay all ordinary taxes, certainly so, if the income is sufficient to enable him to pay them. Johnson v. Smith, 5 Bush. (Ky.) 102; Cairnes v. Chabert, 3 Edw. Ch. R. (N. Y.) 312; Pike v. Wassel, 94 U. S. 714; Varney v. Stevens, 22 Me. 334; Prettyman v. Walston, 34 Ill. 192. And generally he must also pay the expenses of managing the estate. Pierce v. Boroughs, 58 N. H. 302; Perry on Trusts, sec. 554. This author also says: "If, however, an assessment is made against the estate for something in the nature of a permanent improvement or betterment of the whole estate, the assessment may be ratably and equitably divided between the tenant for life and the remainderman," citing Plympton v. Boston Dispensary, 106 Mass. 546, which was a case of an assessment of benefits for opening a highway in the vicinity of the property. In the case of Cairnes v. Chabert, supra, it was intimated that this rule, requiring the life tenant to pay the taxes, ought not to apply to those extraordinary taxes levied for municipal improvements and permanently beneficial to the land, known as assessments; and accordingly it has been held in the various courts of the State of New York, that the remainderman must contribute to the payment of assessments for municipal improvements. Gunning v. Carman, 3 Redf. 69; Fleet v. Dorland, 11 How. Pr. 489; In re Estate of Miller, 1 Tuck. 346; Stillwell v. Doughty, 2 Brad. 311; Peck v. Sherwood, 56 N. Y. 615.

In some of these cases it does not appear what the improvements were. In one the assessment was for a sewer, in another for ouening a street, but in the case last cited the assessment was for flagging a sidewalk. The rulings in those cases were probably not controlled by the statute cited in Fleet v. Dorland, supra, but it is quite likely the statute had an influence upon the result reached. The Supreme Court of Pennsylvania, in Hitner v. Ege, 23 Pa. St. 305, held that the cost of a brick sidewalk should be charged to the tenant for life, and not to the remainderman, and on the ground that it was not a permanent improvement; and so a doweress must pay the cost of a foot pavement in front of a lot occupied by her as a residence. Whyte v. Mayor, 2 Swan (Tenn.) 364.

In this case the question arises between the life tenant and remainderman, and we are considering it in no other aspect. It cannot be affirmed that contribution must be made in all local assessments. Many of them are of a temporary character, such as board and brick sidewalks. The rule, it is believed, to be extracted from the authorities, is, that contribution must be confined to cases of assessments for improvements, which, in their nature, are permanent, and do not require renewals from time to time. This rule will include benefits for opening and widening streets, and assessments for grading streets, and the construction of permanent sewers. But in the present case, the tax bills were, and will be, issued for improving the surface of the streets, that part of them which is subject to constant wear and tear, and in the nature of things the pavements must require repairs and renewals. Doubtless the granite pavement is more lasting than the asphalt, but we do not think either comes within the rule before stated. In this particular case it is conceded the plaintiff is only twenty-eight years of age, and, according to the tables adopted in the life insurance law of this State, his expectation of life is thirty-six years and over. It can hardly be hoped that these payments will last that long without renewal. It is true the taxes are large, but we cannot make the amount of them the criterion.

The demurrer was properly sustained, and the judgment is affirmed.

HUNTER v. WHITWORTH.

9 Alabama, 965.—1846.

Collier, C. J.—It is laid down in general terms, by elementary authors, that where a man marries a woman seised of an estate of inheritance in lands, and has by her issue born alive, which was capable of inheriting her estate, he shall on the death of his wife, hold the lands for his life, as tenant by the curtesy. 2 Black. Com. 126; Steph. Com.

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24; 1 Lomax, 65-6. Whether this estate is a consequence of feudal tenure, is a point perhaps upon which all are not agreed; it is, however, stated by all the text-writers, that the husband is the natural guardian of the child, and as such, is in reason entitled to the profits of the land, in order to maintain it. "As soon, therefore, as any child was born, the father began to have a permanent interest in the lands, he became one of the pares curtis, did homage to the lord, and was called tenant to the curtesy initiate; and this estate being once vested by the birth of a child, was not suffered to determine by the subsequent death or coming of age of the infant." There are four requisites to constitute a tenancy by the curtesy, viz.: Marriage, seisin of the wife, issue born alive, and the death of the wife. See the citations above.

It has been held not necessary that there should be seisin and issue at the same time; and therefore if the wife become seised of lands during the coverture, be afterwards disseised and then have issue, the husband shall be tenant by the curtesy of those lands. So if the wife becomes seised after issue born, though the issue die before the seisur. Jackson v. Johnson, 5 Cow. Rep. 74; see also, 2 Conn. Rep. 565; 5 Id. 236. In Heath v. White, 5 Conn. Rep. 235, it was said though the tenure by curtesy may have originated from the husband's obligation to support his children, yet the extent of his interest is not measured by this reason for its introduction. He is entitled to hold for life, whether his children need his support or not, and whether they live an hour only or to old age And it has been decided in this State that a decree of divorce, a mensa et thoro, pronounced against the husband, does not bar him of the right of curtesy. Smoot v. Lecatt, 1 Stew. Rep. 590.

Where B. devised the whole of his estate to his daughter, "to her, her heirs and assigns forever," but if she should die without issue, his whole estate was to be sold by his executors, and the money arising therefrom, after his widow's decease, to be equally divided among his brother's and sister's sons. The daughter married, and had issue which died during her life. Yet it was held that the husband was entitled to her estate, as tenant by the curtesy. Buchanan v. Sheffer, 2 Yeates' Rep. 374. We cite these cases to show the favor with which the law regards this description of estate, with what liberality it extends it, even beyond the object for which its introduction was mainly intended to provide; that it is protected, although the wife is absolved from the obligation of living with her husband, in consequence of some fault of his; and that even the express terms of a devise shall be so construed as not to divest a tenacy by the curtesy, if the husband's right once attached. Having said thus much in respect to the estate in general, we now proceed to consider it in reference to the statutes, which it is insisted for the plaintiff in error, are decisive of the case at bar. By the act of 1806, for the regulation of descents, and the distribution of estates, among other things, it is enacted, "Where a man having by a woman a child, or children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." Clay's Dig. 168, § 3. The act of 1811, "concerning bastardy," provides, that if the mother of a bastard child and the imputed father shall, at any time after its birth, intermarry, the child shall in all respects be deemed and held legitimate, conformably to the maxim of the civil law. Clay's Dig. 134, § 6; see also Croke on Illegitimacy, 95.

By legitimating a bastard, we are to understand that he is placed in the same state as if he were born in wedlock, that is in a lawful manner. Marriage is considered by all civilized nations as the source of legitimacy; the qualities of husband and wife must be possessed by the parents in order to make the offspring legitimate, where the municipal law does not otherwise provide. See the Civil Code of Lou. Arts. 203 to 216. In the same work it is declared that children born out of marriage, except the fruit of an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever they have legally acknowledged them as their children. And children legitimated by a subsequent marriage have the same right as if they were born during marriage. Id. Arts. 217, 219.

Marriage then is regarded as the primary essential to legitimacy, and produce of an illicit connection are, in a

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legal sense, expurgated when the parents form such a union. The law regards such a child for all purposes as if born in wedlock—the duties and obligations which such a child and its parents respectively owe to each other, are precisely the same as if marriage had preceded its birth. It can inherit and transmit the inheritance in consequence of its paternity, to and from the relatives of the father. No matter from what source the tenacy by the curtesy takes its origin or upon what reasoning it originally rested, the rights and duties of the father in respect to such child are the same in all respects as if he had been legitimate from his birth.

If what we have said be well founded, the father is under a legal as well as moral obligation to provide for his legitimated offspring, above what the law requires him to do for a bastard child. To enable him to perform the duty of maintenance, we think he clearly must, at common law, be entitled to the lands of which the wife was seised during coverture. That this much favored estate by the curtesy may be upheld and secured, the husband may, by a kind of legal fiction, pro re nata, be presumed to have married previous to the birth of the child. This presumption could do harm to no one, as it would not, of course, be carried so far as to divest interests which the wife had passed from herself between the birth of the child and the marriage.

Having attained a conclusion favorable to the plaintiff in error upon the first point, we need not consider the second. Let the judgment be reversed and the cause remanded.

HATFIELD v. SNEDEN.

54 New York 280.—1873.

Ejectment by an executory devisee against the husband of the (deceased) owner of the estate which was subject to the executory devise. Plaintiff succeded below and defendant appeals to this court.

Johnson, C.—Upon the true construction of the will of Mary Wood, the estate of her daughter was a fee determinable upon the happening of the events on which the devise to the plaintiff was to take effect. The language of the primary devise is to the daughter and her heirs forever. Then followed a clause which, in the event of the return to the county of the son of the testatrix (the son was supposed lost at sea), gave them the estate in equal shares. The testatrix further directed that if the daughter should never have any children, or a child living at her decease, if her son should not return then the devised estate was to go to the plaintiff in fee.

In the first place it is to be observed that the earlier part of the phrase in respect to the daughter's issue is inoperative and meaningless, taken in connection with the latter part of the same clause. If the daughter had no child living at her decease, it was of no consequence how many she might have had at an earlier period. If she had a child living at her decease, then, of course, it could not be true that she never had any children. The substance of the whole clause is the same as if the testatrix had said, if my daughter, at her decease, leaves no child living, and if my son does not return, then the estate is to go to the plaintiff in fee. The concurrence of both of these events was necessary to carry the estate to the plaintiff. If the son returned, Hatfield took nothing irrespective of the question of the daughter leaving a child living. If the daughter left a child living, and the son did not return, Hatfield took nothing, and her issue living at her death would not have taken under the testatrix's will, but by descent from their mother, out of the fee devised to her, which had not been defeated by the prescribed events.

The return of the son, and the death of the daughter, without leaving a child surviving her, were events, which, from their nature, would be determined within their two lives, and there is no objection on the ground of remoteness to the executory devise in favor of the plaintiff. Nor is there any question that both events on which the executory devise over to him was to take effect have been determined in his favor. The son, who had been absent three years in October, 1851, when Mary Wood made her will, had not returned or been heard of in March, 1861, when the daughter died without a surviving child. There is, therefore, such a presumption of his death that his return may be taken to have become impossible before the death of the daughter.

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Nothing then stands in the way of the plaintiff's recovery, unless the defendant has an estate as tenant by the curtesy by reason of his marriage to the daughter and the birth of their living child during the marriage, who might, if she had outlived the mother, have inherited the whole estate in question. The defendant was, therefore, entitled to curtesy if the estate of his wife was such that curtesy could be had of it. The point thus presented has been subject of elaborate discussion in the text-books, and of criticism upon the case of Buckworth v. Thirkell, decided by Lord Mansfield, and reported in 4 Doug., 323, Collect. Jur. 332; 3 B. & P. 652 n., and upon that of Moody v. King, 2 Bing. 447, which fully upholds it after it had been spoken of with disapprobation by Lord Alvanley in Doe v. Hutton, 3 B. & P. 643, 651. The discussion has been so full and complete that it seems impossible to throw any additional light upon the views and various arguments which have been adduced upon it. The most accurate and comprehensive discussion which I have found upon the subject is in Washburn's Law of Real Property, vol. 1, §§ 11 to 21, of ch. 6, of book 1, pp. 131-135, and §§ 31 to 33, of ch. 7, of the same book, pp. 212-217, in which the cases in England and in the United States are stated and examined with ability. There results a division of opinion in the courts which is irreconcilable, and in respect to which, additional discussion is not likely to afford advantage. To restate and reconsider this full discussion could only serve to incumber, by a useless parade of cases, the already too voluminous reports. The conclusion which is stated in the work cited (p. 135, § 21) is:

"If the estate of the wife be an estate of inheritance, determinable by a limitation which operates to defeat her estate at common law the right of curtesy is gone. But, if the limitation over be by way of springing use, or executory devise, which takes effect at her decease, thereby defeating or determining her original estate, before its natural expiration, and substituting a new one in its place, which could not be done at common law, the seisin and estate which she had of the fee simple or tail will give the husband curtesy." It may properly be added that the strong objection proposed to this doctrine by its critics, is to the consequence which they deem unreasonable, that an estate determined according to the terms of its creation should by the incident of curtesy or dower be prolonged. To this, it seems to me a fair and complete answer to say, as Lord Coke says in Paine's Case, 4 Coke R., part VIII., Frazer's ed., p. 212, marg. 36 a, in answer to a similar difficulty as to curtesy after an estate tail determined by the death of the wife, tenant in tail, and of her issue, "the husband's estate shall continue, for it is not derived merely out of the estate of the wife, but is created by law," "by the privilege and benefit of the law tacite annexed to the gift." This possible continuance of dower or curtesy as an incident of the estate created may well be deemed to have been in the contemplation of the testatrix, and is not an unreasonable or unnatural provision for the possible husband or wife of one clothed with a fee simple not defeasible, except upon death without children living. The only authority in this State in conflict with this conclusion is a decision at Special Term in Weller v. Weller, 28 Barb. 588, in case of dower, which was put upon the ground of criticism in Park on Dower, upon Lord Mansfield's decision. The decision at General Term in the present case seems to have gone upon the ground that the interest given by the will of Mary Wood to her daughter was a life estate only, with remainder to her issue, if any, as purchasers. This construction we have seen could not have been maintained, Hatfield v. Sneden, 42 Barb. 615 There is another aspect of this case which, from the record, appears to have existed, or been in the highest degree probable, viz., that the daughter was, at her mother's death, her only heir-at-law. In that case she would have been in by descent in fee, and the only effect of the devise would be to create an executory limitation to Hatfield in case of the concurrence of the two events on which the estate is given over. That she would have been in by descent the preferable title, and not by the devise, is obvious. Doe v. Timins, 1 B. & Ald. 530. In that case it would be difficult to take from the estate in fee any of the incidetns which the law has attached to such an estate, and impossible to deny that her husband was entitled to curtesy according to every

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definition given in the books of such an estate. In this aspect we may take it that the will is silent about the absent son and his possible return, and silent about the daughter, except as both are mentioned in limiting the executory devise. That no estate is devised either to son or daughter, but that the only provision of the will is, if my son shall not return, and daughter shall die, leaving no child living, then I devise to Hatfield. Under such a will the daughter would take just what the will in question gave her, and for exactly the same estate. Being thus in by descent, there is in the books not only no warrant of authority, but not even a suggestion that the estate in fee by descent can be deprived of any of the lawful incidents belonging to estates in fee. It is not until those are exhausted that the executory devise to Hatfield can take effect in possession.

It may be regarded in another aspect, equally pointing to the same result. If the devise had created an estate tail (supposing such an estate could at that date have been created in this State), and it had been limited in tail general to the daughter, with a remainder in fee simple to the plaintiff, that estate in the event which has happened would have had the same duration as the fee given to her in this case. It would have terminated with her life, the issue in whom alone it could have continued having died before her. Yet, in that case, the husband's right to curtesy would have been clear beyond all question. It would seem not a little singular that the greater estate, the fee simple which this daughter took, either by descent or devise, should not avail to give to her husband that which he unquestionably would have taken had her estate been of an inferior quality and less than a fee simple.

Again, leaving out of view all technical aspects of the case, and looking only to the general intention of the testatrix, it is obvious that she did not mean the plaintiff to take anything unless her two children should be dead, and should have left no children living. She knew that the son had no children, and was probably dead, but if he came back he and the daughter were each to have a half. If he did not return, the daughter was to have the whole, but if she died leaving no child, then, her descendants being extinct, the estate was to go to plaintiff. Her purpose was not to lower the quality of her daughter's estate or to deprive it of the ordinary incidents of estates in fee, but only to give it over when there should remain no longer any one to hold it representing her daughter.

The only remainig question is as to the effect of the married woman's acts of 1848 and 1849 upon the law in respect to curtesy. After sundry conflicting decisions, the law has become substantially settled, that while those acts excluded the husband during life from control of, or interference with, his wife's separate real and personal estate, and gave to hr alone the power of disposition by deed or will, yet they left the husband the right of curtesy in her real property and of administration for his own benefit of her personalty, in so much as remained at her death undisposed of and unbequeathed. Matter of Winne, 2 Lansing, 21; Ransom v. Nichols, 22 N. Y. 110; and Barnes v. Underwood, 47 Id. 351.

The judgment should be reversed, and judgment rendered for defendant on the verdict, with costs.

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PHELPS v. PHELPS.

143 New York 197.—1894.

Gray, J.—This is an action, in equity, brought by a wife to establish and protect an inchoate right of dower in certain lands now held by, and in the name of, a third person; but which were paid for by the plaintiff's husband, and, also, to establish her dower right in the proceeds of certain other lands similarly purchased and held. Her complaint having been demurred to for insufficiency to state a cause of action, we must assume all its averments of material facts to be true. After alleging a marriage and the birth of children, she sets forth a separation between herself and her husband, caused by his neglect, wrong conduct and desertion. She alleges that since his desertion of her, with the intent and purpose of defrauding her of her dower rights in his real estate, her husband had purchased various pieces of land, and caused the title to be taken in the name of one Lewis, as a dummy in the transaction, under an agreement and arrangement with said Lewis that the said de-

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fendant (meaning her husband), "should receive all the benefit of and have full control over said property, which agreement was in writing."

She alleges that her husband "retained and exercises full possession and control over the same," and that when he desired to dispose of any of the property, he would "under the agreement and arrangement with said Lewis present the deeds and papers to him, which said Lewis, under his agreement, was bound to execute;" that all of the property, with the exception of one piece, was thus disposed of by her husband "to bona fide purchasers, without notice of the dower interest of this plaintiff," and that her husband "received the full amount of the purchase money paid for the same, for his own use and benefit." She then proceeds to describe the piece remaining unsold, which she alleges to have been conveyed by Lewis, at the request of her husband, without consideration, to the defendant Goodwin, a partner of her husband, "who was to hold the same under the same agreement that said Lewis had with her husband," and as to this property the plaintiff charges her husband to be the real owner. She prays for a decree, which will adjudge, because of these transactions and their fraudulent purpose, that the proceeds received by her husband upon the sale of any of this property "are still real property and that this plaintiff has an inchoate right of dower in the same;" that her husband be ordered to pay one-third of these proceeds into court, there to be held and invested, etc., etc., and that as to the land held by Goodwin, it be adjudged to be subject to her inchoate right of dower, etc, etc.

With this as a sufficient summary of the material facts of her complaint, we are confronted with the pretended cause of action, for which I am unable to find any sufficient basis in our Revised Statutes; to which we must look for the authority for the claim of a wife to be entitled to dower in lands. To entitle the wife to dower the husband must be seised, either in fact or in law, of a present freehold in the premises, as well as of an estate of inheritance. That proposition follows from the language of the section in the Revised Statutes, that "a widow shall be endowed of the third part of all the lands, whereof her husband was seised of an estate of inheritance at any time during marriage."

How can seisin be predicated of the plaintiff's husband with respect to the lands purchased through the use of his moneys, but never conveyed, nor agreed to be conveyed, to him? The plaintiff, certainly, had no control over the use which her husband chose to make of his personal estate. That was his absolutely and she had no interst in it which she could assert; beyond a claim upon him for the support of herself and their children. He might have chosen to use it in the acquisition of any of the many kinds of personal property, without any right on the part of his wife to complain of, or to interfere in, his acts. Instead of confining his use of his moneys to purchases of personal property, or instead of putting them into land and of taking title to himself, he has adopted methods set forth in this complaint for its use, and they were effectual to prevent the vesting in him of any legal estate in the realty, although paid for with his moneys. He, undoubtedly, intended to prevent his wife from acquiring any dower right in the real property, in the purchase and sale of which he was dealing through his friend; but, unless he was actually seised, or unless he had such seisin at law as would entitle him to its possession, it is difficult to see how his wife could claim that she ever gained any dower interest. Her complaint seems to concede that her husband acquired no legal title, unless through the agreement alleged to have existed between him and Lewis. But that agreement is not one which could operate to vest in her husband any right to the actual possession of the property conveyed to Lewis. The agreement is purely executory in its nature and, if not complied with by Lewis, would only have given to Phelps a cause of action in damages for its breach. Taken at its strongest meaning, it cannot be said to import any grant by Lewis of any interest in the property acquired by him, through which a legal estate would arise in favor of Phelps. It does not rise beyond the promise of Lewis that Phelps should have the full control and enjoyment of whatever real property he might become vested with the title to, under

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their arrangement. Phelps' rights rested in the promise of Lewis. It is manifest, from the statute, that notwithstanding the consideration for the grant of the real property to Lewis was paid by Phelps, the title vested in the grantee, free of all claims, except the claim which creditors might have to assert that the transaction was fraudulent as to them. See §§ 51 and 52 of the article on Uses and Trusts. It is needless to argue that wives cannot come under that classification.

The position of a wife, with respect to her husband's property, is limited by the Revised Statutes, and unless she can bring herself within their limitations, she is without the right to assert any claim to it. Concededly, in this case, the husband was never seised of the property in question and the agreement set forth, and which is claimed to confer upon him its real ownership, could create no interest, or right to possession. If it were possible to assume a right in Phelps, based upon the agreement, to maintain an action for the reconveyance by Lewis to himself of the lands, such an assumption clearly negatives any idea of the existence of a legal estate in Phelps. We may assume, as it is alleged, that he was to receive the benefits arising from the lands; but if there was a beneficial use, it must be united with a right to the possession (a right which is not alleged here), before we can perceive the existence of any estate, upon which a claim of dower may be impressed.

It is not pretended that any precedent exists in the decisions of the courts of this State for the maintenance of this action.

So far as my examination has gone, I am unable to find in the adjudged cases any support for the proposition that a right to dower can be asserted, except with respect to real property of which the husband was actually seised during his lifetime, or to the actual seisin of which he had a legal right. The cases referred to by the respondent's counsel in the repart of the courts of other States are inapplicable in the construction of the statutes of our own State. They may, or may not, turn upon the wording of particular statutes; however it may be they cannot control when our own statutes are in question.

It results from my consideration of the case, that the order and judgment below should be reversed and that an order should be entered dismissing the complaint, with costs in all the courts to these appellants.

MORSE v. PROPER.

82 Georgia 13.—1888.

One L. S. Morse conveyed certain premises to his stepmother, Anna Morse, as her separate estate for life, and after the death of said Anna Morse gives "said property * * * to such of the children of said Anna Morse by her present husband as may be living at her death, and the representative of such as may be dead, in fee, the representative to take the share these deceased persons would have been entitled to, had he or she been alive; but if the said Anna Morse should die without child or children, or the representative of either, then the whole of the above-named property. with the increase, I give unto said Oliver Morse [her husband] in fee simple." Daniel Morse, the only child of Oliver and Anna, was living when the deed was made. Daniel died in 1868, and thereafter Oliver made a will giving all his property, present and expectant, to Anna. Oliver soon thereafter died, and Anna made a will giving all her property to her sister, Mrs. Proper. Anna having died, L. S. Morse brings this action to prevent Mrs. Proper from interfering with the property in question.

Decision below for Mrs. Proper. Morse appeals.

Simmons, J.—* * * The question for decision in this case is, whether Oliver Morse had such an interest in this property at the time of his death, in 1868, as he could transmit by will to his wife. If he did have such a devisable interest, having devised it to his wife, and his wife having devised it to her sister, the defendant in error here, the chancellor was right in refusing the injunction. It will be remembered that the deed from L. S. Morse to Anna Morse gave her this property for and during her natural life, and after her death it was to go to her children or the representatives of the children; and in case she died leaving no children or repre-

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sentatives of children, the property was to go to Oliver Morse, in fee. In our opinion, Oliver Morse, under this deed, took a remainder interest in this property. Was it vested or a contingent remainder? The plaintiff in error contended that it was a contingent remainder, and that the contingency was as to the person, and therefore Oliver Morse, under section 2266 of the code, had no such interest in the property as he could devise to his wife. Counsel for the defendant in error (1) that Oliver took a vested remainder, under the deed made in 1855, (2) but that if it was a contingent remainder, the contingency was as to the happening of an event, and not as to the person, and therefore he had a right to devise it. This case was ably argued by counsel on both sides, and we have given it a great deal of consideration, and we think that Oliver Morse had such an interest in this property as he could devise to his wife; and therefore the chancellor was right in refusing the injunction. We think that under the deed he took a contingent remainder, and the contingency was as to the event and not as to the person. The language of the code on this subject is as follows, § 2265: "Remainders are either vested or contingent. A vested remainder is one limited to a certain person at a certain time, or upon the happening of a necessary event. A contingent remainder is one limited to an uncertain person, or upon an event which may or may not happen." § 2266: "If the remainderman dies before the time arrives for possessing his estate in remainder, his heirs are entitled to a vested remainder interest, and to a contingent remainder interest when the contingency is not as to the person but as to the event." The deed in this case declares that "if said Anna Morse should die without child or children or the representative of either, then the whole of the above namd property, with the increase, I give unto the said Oliver Morse in fee simple." We think the contingency depended on the exent of Anna Morse dying without children or the representative of children. The deed means, in our opinion, that in the event, or in that case, or when that particular thing should happen, Oliver Morse should take if there were no children or representative of children, living at the time of her death. The person to take in that event was certain, and was fixed by deed. In case there were no children or representatives of children living at the time of Anna's death, the deed points unerringly to the person who would take, and declares that he should take in fee simple, which, under our law, means not only himself but his heirs and assigns. If the deed had said that in case Mrs. Morse died without children or representative of children, then to the heirs or right heirs of Oliver Morse, the person to take in that event would have been uncertain; or if it had said, in case of Mrs. Morse dying without children or representative of children, to the heirs of John Smith, the persons to take would have been uncertain; but as we have said before, the deed does not leave it uncertain who is to take in the event she died without children or representative of children. It seems that in that case, Oliver Morse is to take in fee simple. Oliver Morse having a contingent remainder interest in this property, did he have a right to dispose of it by will to his wife? We think he did. The old doctrine was, that contingent remainders were not devisable by the person entitled thereto; but that doctrine was abandoned many years ago, and it is now held almost universally that a contingent remainder is devisable where the contingency is not as to the person but as to the event. Indeed, that is the principle announced in our code, §2266. That section declares that if the remainderman dies before the time arrives for possessing his estate, his heirs are entitled to a contingent interest, when the contingency is not as to the person but as to the event. If the contingency be as to the person, and that person be not in esse at the time when the contingency happens, his heirs are not entitled. It is contended by counsel for the plaintiff in error that the latter part of this section controls the case; but we think we have show that the contingency was not as to the person, but as to the event; and therefore the latter part of the section does not apply to this case.

Counsel for the defendant in error cited the case of Loring v. Arnold, 8 Atlantic Rep. 335, Supreme Court of Rhode Island, the facts of which case, we think, are exactly the same as in the

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case now under consideration. In that case, it appears that Thomas Whipple died in 1843, leaving a will by which he devised certain real estate to his son James, "for and during his natural life, and at his decease, if he should leave any lawful child or children, then to them, their heirs and assigns forever; but if he should die without leaving any lawful child or children, then my will is that the same shall descend and be divided equally among his brother T., his sisters G., M., S., A., and J. A. B., to them, their heirs and assigns forever." J. A B. died in Illinois, in 1881, leaving by will all her estate in Rhode Island to C. E. B. James died in 1885, leaving no wife or children. It was held that J. A. B. had a contingent remainder; and that although this contingency was not determined until after the death of J. A. B., yet the person who was to take being certain, the interest was descendible and devisible. So also in 2 Leading Cases in the American Law of Real Property, 374; Buzby's Appeal, 61 Pa. 111; Chess's Appeal, 87 Pa. 362; Fearne on Rem. 7th ed. 364-5; 4 Kent, 264; 2 Washb. Real Prop. 552.

The case of Jackson v. Waldron, 13 Wendell, 178, relied on so strongly by the plaintiff in error, was overruled in the case of Miller et ux. v. Emmons et al., 19 N. Y. 384. The decision in the case Morehouse v. Wainhouse, decided in 1767 and reported in 1 Blackstone's Reports, also relied on the plaintiff in error, was put upon the peculiar circumstances of that case, and the facts of that case are different from the facts in this.

Judgment affirmed.

CARMICHAEL v. CARMICHAEL.

43 New York 346—1868.

Clerke, J.—Daniel Carmichael died September 3d, 1849, leaving the defendant, his widow, and six children, him surviving. The eldest of them (Otis) was the child of a first marriage. He did not live with his father, but lived in Middletown, in this State, where his father provided for him. At the time of his father's death he was an invalid, and died about two years afterward. He married the plaintiff soon after his father's death, the engagement having been made prior to that event; he left one child. Daniel Carmichael, shortly previous to his death, made a will, of which the following is a copy: [The material part only is given here.]

"After the payment of all my debts, I give, devise and bequeath all and singular my estate and property, of whatever kind, and wheresoever the same may be situate, unto my beloved wife Eliza, for and during the term of her natural life; and from and after her decease, then I give, devise and bequeath the same unto my children, who may then be living, in equal parts, share and share alike—it being distinctly understood that the part or share of my son, Otis Carmichael, under said division or appropriation, shall be held and invested by my surviving executor, his heirs and assigns, in trust, to keep the same well and securely invested during the lifetime of my said son, and to pay over to him, my said son, the rents, income and interest thereof as received, and dispose of and apply the principal of said share as my said son may by his last will and testament, or any instrument in the nature thereof, direct, limit and appoint. And in default of such direction, then to the right heirs of my said son, under the intestate laws of New York." * * *

This will was admitted to probate on or about the 15th of October, 1849, before the surrogate of the county of Broome. Otis Carmichael, previous to his death, made a will, by which he gave to his wife (the plaintiff) the annual sum of $500 during her natural life; and he further gave unto her, in trust, for the maintenance and education of his son, all the annual proceeds of his real and personal property, until his son should attain the age of twenty-one years. He secondly devised and bequeathed unto his son, all his real and personal property, subject to the annual payments given to his wife.

This action is brought by the widow of Otis, for the purpose of compelling the defendant, executrix of the will of Daniel Carmichael, to render an account of his property and effects, which may have come into her hands as such executrix; and, after the accounting, it is prayed that the same may be divided, and that the defendant be adjudged to pay over to the plaintiff, one-sixth part of the estate of Daniel Carmichael, with

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interest thereon from January 1, 1850.

The defendant demurred to the complaint, upon the ground, first, that the plaintiff had no legal capacity to sue, and, second that the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, both at the Special and General Term.

The demurrer was properly sustained. The widow of Daniel Carmichael is living, and, by the express provision of his will, she is entitled to all the use and enjoyment of his property during the term of her natural life; and she is under no obligation to account to any of the children, for the purpose or having it divided among them. The estate does not vest in remainder until her death; and then it vests only in those children who shall be living at the time of her death. The plaintiff, under the will of Otis Carmichael, acquired no estate or interest in the property of Daniel Carmichael, and has, in fact no standing in court.

Judgment affirmed.

HAVENS v. SEA SHORE LAND CO.

47 New Jersey Equity, 365—1890.

Van Vleet, V.-C.—This is a partition suit. The title to one of the tracts which the complainants seek to have divided is in dispute. The defendant asserts title to the whole tract; the complainants, on the other hand, assert a title to the undivided half or it, but admit that the defendant has title to an undivided fourth and that the title to the other undivided fourth is in certain other persons. The defendant exhibits a paper title to the whole tract; the important question therefore, presented for decision is, is the title exhibited by the defendant valid? for if it is, the bill as against the defendant, as to that tract, must be dismissed

Both parties claim under David Curtis, who died intestate between 1783 and 1788. At the time of his death he owned two undivided sevenths of Manasquan Beach, one of which he acquired from Elisha Lawrence, by deed dated July, 1770, and the other from Benjamin Lawrence, by a deed which it is alleged is lost. Among the gifts made by David Curtis by his will there is one which reads, in substance as follows:

"I give and devise unto my oldest son, Elisha, that right of beach I bought of Elisha Lawrence—to him and the heirs of his body lawfully begotten, and for the want of such heir or heirs, then to be equally divided between my two sons, John and Benjamin."

David Curtis, besides limiting over to his two sons, John and Benjamin, the land devised to his son, Elisha, made John and Benjamin his residuary devisees, and they, as such devisees, took that undivided seventh of Manasquan Beach which had been conveyed to their father by Benjamin Lawrence. The thing in dispute is the one-half of that seventh which David Curtis acquired from Elisha Lawrence, and which he by his will limited over to his son John in case his son Elisha, for the want of heirs of his body, did not take it. The defendant claims this half and puts forward as the foundation of its title a deed purporting to have been made on the 31st day of May 1788, by John Curtis to Joseph Lawrence. The whole contest between the parties centres in this deed. If it passed the land in controversy, the defendant will be entitled to prevail in this suit; if it did not, the complainants will be entitled to the decree they ask. The complainants contend, first, that the deed has not been sufficiently proved to entitle it to be admitted in evidence; and, secondly, that if it was admitted, no effect could be given to it—first, for the want of apt words to pass any right or estate which the grantor may have held at the time of its execution; and, second, because the grantor then held no right or estate in the land which he could grant or convey. These questions will be considered in an order directly the reverse of that in which they have just been stated.

It is undisputed that Elisha Curtis, the eldest son of David, died childless, never having had issue of his body. John died before Elisha. Their deaths occurred very near together in point of time, but the proof makes it entirely clear that John died first, so that it was undetermined when John died whether or not Elisha would have issue of body. As the law stood when the devise to Elisha took effect, it is clear that he took an estate tail in the land devised. Our statute cutting an estate tail down to an

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estate for life in the first taker, with remainder in fee to the issue of his body, was not passed until 1820, Elm Dig. 130, § 6, and the devise to Elisha took effect prior to 1788. Chief Justice Kirkpatrick stated in Den v. Taylor, 2 South. 413, 417, what words would be held to be sufficient to create an estate tail. He said: "It is well setttled that a devise to one and his heirs if he die without issue, then over to another, creates an estate tail, as if the principal devise had been in the most technical language, to him and the heirs of his body. The words of the devise over—if he die without issue then over to another—limit the generality of the term heirs in the principal devise, and lead us to the enevitable conclusion that the testator intended heirs of the body only, and not heirs generally. And whenever this intention can be collected from the whole will, taken together, let the phraseology in the particular clauses of it be what it may, it has been always construed to make an estate tail." This statement of law has been so uniformly followed by the courts of this State as to have become a canon of real property law. Moore v. Rake, 2 Dutch. 574, 585. It is entirely clear that Elisha Curtis took an estate tail in the land in controversy.

This being so, it necessarily follows that the devise over to John and Benjamin, in case Elisha did not have issue of his body, gave them a vested remainder in fee, subject to be defeated by the birth of issue to Elisha. The law is settled, that a remainder limited upon an estate tail will be held to be vested, though it is uncertain whether a right to possession will ever vest in the remainderman. The decision of the Court of Errors and Appeals in Moore v. Rake, 2 Dutch. 574, is directly in point, and furnishes an authoritative illustration of the manner in which this principle of law is to be applied. The devise in that case took effect in 1795, and was expressed substantially in this form:

"I give to my son Isaac, his heirs and assigns, all my lands whereon I now live, to hold to him, his heirs and assigns forever, but if my son Isaac should die without lawful issue, then I give all my land to my wife, her heirs and assigns forever."

The testator's son Isaac died in 1843, without issue, never having been married. His mother, the testator's widow, died in 1832, over ten years before Isaac. The controverted question in the case was what estate the testator's wife took under the devise. The court held that she took a vested remainder, and not by way of an executory devise, nor a contingent remainder. Each of the three judges who wrote opinions—Chancellor Williamson and Justices Elmer and Vredenburgh—so expressly declared. Justice Vredenburgh (p. 586) gave the following summary of the leading rules distinguishing a vested from a contingent remainder. "An estate is vested when there is a present fixed right of present or future enjoyment. The law favors the vesting of remainders, and does it at first opportunity. It is the present capacity of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder. It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of the actual enjoyment. A remainder limited upon an estate tail is held to be vested, though it is uncertain if the possession will ever take place." There can, therefore, be no doubt that John Curtis, by the force of the devise to him, took a vested remainder in fee in the land in controversy, and it is equally certain, if such was the character of his estate, that he had good right and full power to make an effectual conveyance of it during the life of his brother Elisha.

If a different conclusion had been reached as to the nature of John's estate, and it had been found that the remainder limited to him was contingent, still I think the court would have been bound to declare, in conformity to the well-settled law on this subject, that he had full power, during the life of Elisha, to make an effectual conveyance of his estate in the land, though it was uncertain whether such estate would ever vest in possession. All contingent estates of inheritance, or possibilities coupled with an interest, where the person who is to take is certain, may be conveyed or devised before the contingency on which they depend happens. In Ackerman's Admr. v. Vreeland's Exr., 1 McCart. 23, 29, Chancellor Green said, it may be relied on as a rule, that every interest in land, however remote the possibility is, may be released. The law on this subject as stated by Sargeant Williams, in his note to Purefoy v. Rogers,

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2 Saund. 388k, and adopted by the Supreme Court in Den v. Manners, Spen. 142, 145, and restated approvingly by Justice Vredenburgh in More v. Rake, 2 Dutch. 593, is this: "It seems now to be established, notwithstanding some old opinions to the contrary, that contingent and executory estates and possibilities, accompanied by an interest, are descendible to the heir, or transmissible to the representative of a person dying, or may be granted, assigned or devised by him, before the contingency upon which they depend takes effect." These authorities make it plain that the first question must be decided in favor of the defendant. At the date of the deed which the defendant puts forward as the foundation of its title there can be no doubt that John Curtis had full power to make an effectual conveyance of the land in controversy.

APR

WADDELL v. RATTEW.

5 Raule (Penn.) 230—1835.)

Kennedy, J.—As the question to be decided in this case arises out of the will of John Rattew, deceased, it becomes necessary in order to solve it correctly, to ascertain, if possible, from the face of the will itself, what was the intention of the testator. And after having discovered this, it will be our duty in construing the devise in question, to carry it into effect, so far as it shall be found consistent with the rules and policy of the law to do so.

The words of the will which have given rise to the present controversy are: "Item, I give and bequeath to my son Aaron, the messuage, planation, and tract of land, where my son John now lives, in Middleton township, containing about one hundred and nineteen acres, more or less, with the appurtenances, to hold to him, my said son Aaron, during the term of his natural life, and if he shall hereafter have issue of his body lawfully begotten, then to hold to him, and his heirs and assigns forever; but in case he shall die without having such issue, then I give and devise the same to all the rest of my children, and their heirs and assigns forever, as tenants in common."

The plaintiff's counsel contend that Aaron took under the will a conditional fee, determinable upon the dying without issue living at his death, and that the limitation over in that event to the testator's other children, must therefore be considered an executory devise, and consequently not affected by the common recovery suffered by Aaron; or, in other words, they allege that Aaron, according to the terms of the will, in case he had had issue, would thereupon have become immediately vested with a fee simple estate in the land devised to him, defeasible, however, upon his dying without issue living at the time of his death. The birth of issue would have instantly determined his life estate, by enlarging it into a fee; and again in the event of his surviving such issue, and dying without any living at the time of his death, the ulterior devise to the other children of the testator could only have operated as an executory devise; because as a contingent remainder, it could not take effect after the determinable fee had become vested in Aaron. I must confess that this view of the devise in question when first presented by the counsel for the plaintiff struck me forcibly as having something in it; and it was certainly maintained on their part with great ingenuity. And if Aaron had not suffered the common-law recovery and had had issue, who had died during his life, and he had then died himself without any living at the time of his death, it may possibly be that the ulterior devise of the land to the other children of the testator would have been operative and taken effect as an executory devise, for it has been said that an estate may be devised over in either of two events, so that in one event the devise may operate as a contingent remainder, and in the other as an executory devise. Doe v. Selby, 2 Barn. & Cress. 926; s. c. 9 Eng. Com. Law Rep. 277; 2 Pow. on Dev. by Jarman, 245.

Be this, however, as it may, the event which has occurred in this case does not render it necessary to decide it under such aspects; but if it did, I see no objection that could be made to it, unless it might possibly be thought by some, that to adopt such a principle would be entrenching upon a rule that has been said to prevail without even an exception to it; which is, that when a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be con-

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strued to be an executory devise. Reeve v. Long, Carth. 310; Purefoy v. Rogers, 2 Saund. 380, and cases cited in note (9), also 2 Pow. on Dev. by Jarman, 237. Besides there is said to be another rule by which an executory devise is distinguishable from a contingent remainder, which seems to be opposed to the construction contended for by the plaintiff's counsel; it is this: That to constitute an ulterior limitation, an executory devise where there is a prior estate of freehold devised, the latter must not be merely liable to be determined before the former shall take effect, which only renders the remainder dependent on it contingent, but it must be determined before the taking effect of the ulterior devise; as in the case of a devise to A. for life, and after his decease to the unborn children of B., this would be a contingent remainder in such children; but under a devise to A. for life, and after his decease and one day to the children of B., the children of B. in this case would take an executory devise. 2 Pow. on Dev. by Jarman, 238. And for the day undisposed of, between the death of A. and the time fixed for the ulterior devise to the children of B. to take effect, the estate would belong to the heir or residuary devisee. Ibid. Stephens v. Stephens, Ca. Temp. Talb. 238. Now, it is obvious in the case under consideration, that the prior estate devised to Aaron for life could not be said to be necessarily determinable before the time at which the ulterior limitation over to the other children of the testator was to take effect; it was at most, even upon the construction contended for by the counsel of the plaintiff, only liable to be determined before that event might happen; and hence according to the rule just mentioned cannot, or least in the event that occurred cannot, be considered an executory devise, but must be deemed a contingent remainder. This construction seems to be requiste also, for the purpose of carrying into effect an intention pretty plainly manifested by the testator, that Aaron should not have it in his power to dispose of the land beyond the period of his own life; so that by construing the prior devise to Aaron, for the term of his natural life, an absolute vested estate in him for life, making it neither more or less with a contingent remainder to him in fee upon his dying, leaving issue living at the time of his death; we give full effect to the letter of the will, as well as the intent of the testator. If the fee given to Aaron, which is admitted to have been determinable, had vested in him during his life, the limitation over to the other children of the testator could only have taken effect as an executory devise, but being ever in contingency and the event having failed upon which it is claimed by the counsel for the plaintiff, that it would have become vested, the ulterior devise of the land to the other children had all the properties of a contingent remainder, and as such might and would have taken effect, if the recovery had not been suffered, and, therefore, could not have operated as an executory devise. The devise to the other children of the testator, is not then the case of a limitation over them, after a prior vested determinable fee given to Aaron, which would make it an executory devise, but it is one of two several fees limited merely as substitutes or alternatives, one for the other, that is, the first to Aaron, if he should die leaving issue living at the time of his death; but, if not, then to the other children of the testator in lieu thereof; thus substituting the latter in the room of the former; if it should fail of effect. This is the principle which was decided in Loddington v. Kyme, 3 Lev. 431; s. c. 1 Ld. Raym. 208, where it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to, or in any degree derogatory from the effect of the former, but by way of substitution for it. And this sort of alternative limitation, was termed a contingency with a double aspect. Fearne on Cont. Rem. 373. So that if the estate vested in the one, it never could in the other. Herbert v. Selby, 2 Barn. & Cress. 926; s. c. 9 Eng. Com. L. Rep. 278. The ulterior devise then to the other children of the testator, being considered in the event that has taken place, a contingent remainder, and Aaron, by suffering the common recovery, having determined his life-estate, the only proof of the remainder, before it became vested, it fell, and never could take effect afterwards.

The plaintiffs, therefore, have no right to recover the land, and the judgment is affirmed.

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RICE v. BOSTON & WORCESTER RAILROAD CORPORATION.

12 Allen (Mass.) 141—1866.

Writ of entry. Defendant's father conveyed the premises in question to the railroad corporation in 1834, by a warranty deed which stated that the conveyance was made upon the express condition that the corporation should forever maintain and keep in good repair a pass-way over the same, and also certain fences. In 1842 demandant's father conveyed to him by a deed of warranty a large tract the description of which included the demanded premises, and died intestate before any breach of the condition. Demandant offered evidence of a breach of condition after his father's death. The judge excluded the evidence and demandant excepts.

Bigelow, C. J.—It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent cannot be legally conveyed by a deed to a third person before entry for a breech. This rule is stated in Co. Litt. 214 a, in these words: "Nothing in action, entry or re-entry can be granted over;" and the reason is "for avoiding of maintenance, suppressing of rights and stirring up of suits," which would happen if men were permitted "to grant before they be in possession." This ancient doctrine had its origin in the early statutes against maintenance and champerty in England, the last of which, 32 Henry VIII., c. 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of forfeiting the whole value of the land or interest granted, or, as Coke expresses it, "grantor and grantee, albeit the grant be merely void, are within danger of the statute." Co. Litt. 369 a. The principle that a mere right of entry into land is not the subject of a valid grant has been fully recognized and adopted in this country as a settled rule of the law of real property, both by text writers and courts of justice. 2 Cruise Dig., Greenl. ed., xiii., c. 1, § 15; 1 Washburn on Real Prop. 453; 2 Ib. 599; I. Smith's Lead. Cas. (5th ed.) 113; Nicoll v. New York & Erie Railroad, 2 Kernan 133; Williams v. Jackson, 5 Johns. 498; Hooper v. Cummings, 45 Maine 359; Guild v. Richards, 16 Gray.

The effect of a grant of a right or possibility of reverter of an estate on condition is thus stated in 1 Shep. Touchstone, 157, 158: A condition "may be discharged by matter ex post facto; as in the exanmples following. If one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever." So in 5 Vin. Ab. Condition, (1 d. 11) the rule is said to be, "when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone." See also 1 Washburn on Real Prop. 453; Hooper v. Cummings, 45 Maine, 359. The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable. In the light of these principles and authorities it would seem to be very clear that the original grantor of the demanded premises destroyed or discharged the condition annexed to his grant to the defendants by aliening the estate in his lifetime and before any breach of the condition had taken place.

The only doubt which has existed in our minds on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. Their privity is essential to the right of the heir to enter. But if the original grantor alienes the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No

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one can claim as heir until the decease of the grantor, because nemo est haeres viventis; and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had aliened in his lifetime. The right of entry is gone forever. Perkins, §§ 830-833; Litt., § 347.

It may be suggested, however, that if the deed is void and conveys no title to the grantee, the right of entry still remains in the grantor and is transmissible to his heir. This argument is inconsistent with the authorities adready cited, which sanction the doctrine that alienation by a grantor of an estate on condition before breach extinguishes the condition; it also loses sight of the principle on which the doctrine rests. The policy of the law is to discourage maintenance and champerty. Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as a foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of the law. Both parties are therefore cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law. It is always competent for a party in a writ of entry to allege that a deed, under which an adverse title is claimed, although duly executed, passed no title to the grantee, either because the grantor was disseised at the time of its execution, or because the deed for some other reason did not take effect. Stearns on Real Actions, 226.

We know of no statute which has changed the rules of the common law in this commonwealth in relation to the alienation of a right of entry for a breach of a condition in a deed. By these rules, without considering the other grounds of defense insisted upon at the trial, it is apparent that the demandant cannot recover the demanded premises; not as heir, because he did not inherit that which his father conveyed in his lifetime; nor as purchaser, because his deed was void.

Exceptions overruled.

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BILLS AND NOTES CASES

FEB

NICHOLLS v. WEBB.

Supreme Court of the United States,

February, 1823.

8 Wheat. 326.

The case is stated in the opinion.

Story, J. This is a writ of error to the District Court of Louisiana. The suit was brought by Mr. Webb, as indorsee, against Mr. Nicholls, as indorser of a promissory note, dated the 15th of January, 1819, and made by Thomas H. Fletcher, for the sum of $4880, payable to Nicholls or order, at the Nashville Bank, and indorsed by Nicholls, by his agent, to the plaintiff. The note became due on the 18th of July, which being Sunday, the note, of course, was payable on the preceding Saturday. The cause came on for trial upon petition, and answer, according to the usual course of proceedings in Louisiana, the answer setting up, among other things, a denial of due demand, and notice of non-payment; and upon the trial, the jury returned a verdict for the plaintiff. The court thereupon ascertained the sum due, and entered judgment for the plaintiff, according to what is understood to be the usual practice of that State.

Several questions have been argued at the bar, which may be at once laid out of the case, since they do not arise upon the record; and we may, therefore, proceed to examine that alone upon which any judgment was pronounced in the court below.

From the issue in the cause, the burden of proof of due demand of payment, and due notice of the non-payment to Nicholls, rested on the plaintiff. It appears that the demand was made, and notice given, at the request of the plaintiff, by one Washington Perkins, a notary public, who died before the trial. The original protest was annexed to the plaintiffs's petition, and contained the usual language in this instrument, stating a demand, and refusal of payment at the Nashville Bank, on the 17th of July, the 18th being Sunday, and that he, the notary, "duly notified the indorsers of the non-payment." Among other evidence to support the plaintiff's case, he offered this protest, together with the deposition of Sophia Perkins, the daughter of the notary. She stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponet to do it, exact copies of the notes, bills, etc.; and in the margin opposite to the copy of the protest made memorandums after notification to indorsers, if any, of the fact of such notification, and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition, she annexed, and verified as true, a copy of the protest in this case. The copy of the protest states the demand, most probably by mistake, to have been made on the 19th, instead of the 17th of July, 1819, and contains a memorandum on the margin: "Indorser duly notified in writing 19th of July, 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects the protest is the same in form as that annexed to the petition. To the introduction of this deposition, as well as of the protest, as evidence, the defendant, Nicholls, objected, and his objection was overruled by the court, and the papers were laid before the jury. A bill of exceptions was taken to the decision of the court in so admitting this evidence; and the sole question now before us, is, whether that decision was right. What that evidence might legally conduce to prove, or what its effect might be, if properly admitted, is not now a question before us. It was left to the jury to draw such inferences of fact as they might justly draw from it; and whether they were right or wrong in their inference, we cannot now inquire.

It does not appear that, by the laws of Tennessee, a demand of the payment of promissory notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the indorsers. And by the general commercial law, it is perfectly clear, that the intervention of a notary is unnecessary in these cases. The

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notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be in cases of foreign bills of exchange; and in strictness of law, it is not an official act. But we all know that, in point of fact, notaries are very commonly employed in this business; and in some of the States it is a general usage so to protest all dishonored notes, which are lodged in, or have been discounted by the bank. The practice has, doubtless, grown up from a sense of its convenience, and the just confidence placed in men who, from their habits and character, are likely to perform these important duties with punctuality and accuracy. We may, therefore, safely take it to be true in this case, that the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he was usually engaged. If he had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice.

The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts of law are, therefore, extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord Ellenborough has very justly observed, that they must expand according to the exigencies of society. Pritt v. Fairclough, 3 Camp. Rep. 305. The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of bills of exchange and promissory notes. The rules of law require that due notice and demand should be proved, to charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these important facilities of commerce, since few persons would be disposed to risk so much property, upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses. There is no doubt that, upon the principles of law, protests of foreign bills of exchange are admissible evidence of a demand upon the drawee; and upon what foundation does this doctrine rest, but upon the usage of merchants, and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers; but it is here extended to foreign officers acting as the agents and instruments of private parties.

The general objection to evidence of the character of that now before the court is, that it is in the nature of hearsay, and that the party is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is, that it is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts, where ordinary prudence cannot guard us against the effects of human mortality? Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive. . . .

* * *

We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business require him to do for others, in case of his death, are admissible evidence of the

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acts and matters so done. It is of course liable to be impunged by other evidence; and to be encountered by any presumptions of fact which diminish its credibility or certainty. A fortiori, we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of h's office, sinc he acts as a sworn officer, and is clothed with a public authority and confidence.

It is, therefore, the opinion of the court, that the evidence excepted to in this case was rightly admitted. The variance between the copy and the original protest, as to the time of the demand, might have been explained to the satisfaction of the jury at the trial; but it forms no ground upon which this court is called upon to express any opinion.

Judgment affirmed, with costs.

FEB

FITCHBURG INS. CO. v. DAVIS.

121 Mass. 121.

Supreme Court of Massachusetts, 1876.

Contract to recover an instalment of $50, due May 30, 1874, and interest, against the indorser of the following promissory note, signed by Honora May and William May: "$1035.20. Fitchburg, November 30th, 1869. For value received I promise to pay John E. Davis, or his order, one thousand and thirty-five dollars and twenty cents as follows, to wit: fifty dollars at the expiration of three months from the date hereof, and fifty dollars at the expiration of each and every three months thereafter until the whole sum of ten hundred and thirty-five dollars and twenty cents is paid, with interest on the whole sum, at the rate of seven per cent, payable semi-annually." Trial in the Superior Court, before Putnam, J., without a jury, who allowed a bill of exceptions in substance as follows:

The making of the note and of the indorsement were admitted. It appeared in evidence that a demand was made upon the makers for the payment of the said instalment, and notice of non-payment seasonably given to the defendant on June 2, 1874. This demand, however, was for the payment of said instalment, and interest then due upon the said note (some of the previous instalments and interest not having been paid), and the notice given to the defendant stated that such had been the demand, and that the holders looked to him for the payment of said instalment and the interest due upon the note. The defendant had never been legally notified of the non-payment of such previous instalments.

The defendant contended that the whole notice was invalidated by reason of its including notice of a demand for more than the indorser was liable to pay; but the judge ruled that as the makers were liable for the whole, the demand was good, and that the notice was not wholly invalidated by reason of the demand covering more than the indorser was legally liable to pay, and found that the indorser was properly notified.

It appeared in evidence that previous instalments and the interest upon the note, according to its terms, had not been paid except as by the indorsement of the proceds of the sale of property as hereinafter stated; that no notice of their non-payment was given to the defendant until, and except the notice of June 2, 1874, being the notice hereinbefore referred to, and the defendant contended that such want of notice for so long a period—the plaintiff holding collateral security—was, under the circumstances, such a dishonor of the note and the instalment sued for as would discharge him as indorser; but the judge ruled that the defendant was not discharged thereby, so far as the amount of the instalment sued for and interest due thereon were concerned.

It appeared that the makers of the note had given to the defendant, at the time of the making thereof, a mortgage of land, to secure its payment, and that the defendant had assigned this mortgage to the plaintiff, on May 2, 1870, at the time when he transferred to it the note.

On April 24, 1874, the real estate was sold at public auction, by virtue of a power of sale in the mortgage, and for a breach of the condition thereof, for the sum of $995, and, after deducting the charges and expenses of the sale, the net amount of $970 was indorsed upon said note on May 2, 1874, and applied towards

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the payment of all of said note then due and unpaid. This application left the instalment now sued on still due and unpaid. The defendant contended that this application was illegal and that the plaintiff had no right to appropriate it in such a way as to cover instalments the non-payment of which he had not been notified of; but the judge ruled otherwise, and found for the plaintiff, in the sum of $54.25, being the instalment sued for and interest from June 2, 1874; and the defendant alleged exceptions.

* * *

Gray, C. J. By the non-payment of the previous instalments as they fell due, the whole note was dishonored, and subjected to all the defences which existed against it when the holder took it. Vinton v. King, 4 Allen, 562. But the omission to give the indorser notice of the non-payment of those instalments does not affect his liability for a later instalment, of the non-payment of which he has been duly notified.

Notice that payment has been demanded of and refused by the maker is sufficient to charge the indorser, without any express demand upon him. Lewis v. Gompertz, 6 M. & W. 399; King v. Bickley, 2 Q. B. 419; United States Bank v. Carneal, 2 Pet. 543. The demand made in this case upon the makers for the payment of the instalment now sued for, and of the interest then due upon the note (some of the previous instalments and interest being still unpaid), included nothing for which the makers were not liable. The notice to the indorser of that demand upon the makers, and of their non-payment, was sufficient to charge the indorser, and was not invalidated by adding that the holder looked to him for the payment of this instalment and of the interest due upon the note. The indorser was certainly liable for the instalment in question, and for interest upon so much of the principal as had not yet become due; and whether he was liable for the whole interest is immaterial.

The plaintiff had the right to apply, to the payment of the previous instalments, the proceeds of the mortgage given by the maker to secure the payment of the note. Blackstone Bank v. Hill, 10 Pick. 129, 133; Saunders v. McCarthy, 8 Allen, 42; Draper v. Mann, 117 Mass. 439.

Exceptions overruled.

BAYLEY v. TABER.

Supreme Court of Massachusetts, May, 1809.

5 Mass. 286.

The declaration in this action contained thirty-seven counts upon as many promissory notes, alleged to have been made by the defendants, each under five dollars, payable to bearer on demand for value received, and bearing date between the third day of October and the thirtieth day of December, 1804. Plea, the general issue.

At the trial, notes comporting with the several counts were produced in evidence, all bearing the impression of plates, types, or printing. The signature of the defendants to all of them was admitted. The defendants offered to prove that some of the notes declared on were in fact made and issued by them after the first day of April, 1805, though bearing date that day; and that the notes which had been so made were antedated by them, to avoid the operation of the Statute of 1804, c. 58, which declares notes of the like description, made or issued after that day, to be utterly void.

Parker, J. This cause was tried before me at the sittings after the last term in Cumberland, in May last; and I then inclined to the opinion that the defendants should not be permitted to allege a falsity in an instrument made and signed by themselves, and which had by them been put into general circulation as money. Notes of this description, under the denomination of Taber's notes, to a large amount, having become a common currency in the district of Maine, it suddenly struck me as inconsistent with the common principles of justice, and the policy of the law, that the promisors in those notes should be allowed to avoid payment of them to an innocent holder, by alleging that they bore false dates, and by showing that in uttering them they had contravened the laws of the Commonwealth.

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I therefore rejected the evidence offered; but very soon after the trial, having revolved the question in my mind at more leisure, I came to doubt of the correctness of my opinion, and intimated my desire to the counsel that the question should be reserved for the consideration of the whole court. This was done in such manner as to cause very little delay, and no inconvenience to the parties or their counsel; it having been agreed that the question should be taken up by the court at this adjourned session, and that the arguments of the counsel should be reduced to writing, and transmitted to the court.

Upon an attentive consideration of the question, and of the arguments sent to us, which on both sides are concise and perspicuous, we are unanimously and clearly of the opinion that the facts proposed by the defendants to be proved to the jury at the trial, constitute a good defence against the counts to which those facts are applicable, and that it is competent to the defendants in this action to set up and maintain such defence.

The Statute of 1804, c. 58, § 1, enacts that all bills, notes, cheques, drafts, or obligations whatsoever, under the amount of five dollars, payable to bearer or order, shall be wholly in writing; and that all notes, etc., under the aforesaid amount, and payable as aforesaid, which should be made or issued after the first day of April then next, and which should bear the impression of types, plates, or printing, should be utterly void, and that no action should be thereon sustained in any court of law.

The second section of the same statute imposes a penalty upon any person who should issue or pass any of the securities described in the first section, after the first day of April, which was April, 1805.

The same statute, c. 134, imposed an increased penalty upon any person who should, after the tenth day of the same April, issue or pass like notes, other than those of incorporated banks, for a less sum than five dollars or whereon less than five dollars should be due, with intent that the same should be circulated as currency.

The statute first cited is peremptory and unequivocal, in enacting that all notes like those declared on in this action, made or issued after the first day of April, 1805, shall be utterly void; and it prohibits the sustaining of any suit upon them in any court of law. The defendants say, and they offered to prove, that some of the notes sued in this action were made and issued after that day. To reject the proofs of these facts because the defendants are the original promisors, and because the plaintiffs may be supposed to be innocent holders of the notes for valuable considerations, would be, to all intents and purposes, to defeat the operation of the statute, and would amount to a judicial repeal of an act of the legislature.

The maker of a note payable to bearer is generally the only person to be called upon for payment, it passing from hand to hand, on the credit of the promisor's name, like bank-bills, the receiver seldom requiring any guaranty from him who passes it. Now, the declared object of the legislature was entirely to prevent the circulation of such paper. But if, by giving a fictitious date to them, the maker is prevented from showing that they were made or issued after the time when they were declared by the statute to be void, they would continue to circulate, as long as there should be confidence in the ability of the makers to pay them.

However hard the operation of the statute may appear to be against persons into whose possession such notes may have come bona fide and for a valuable consideration, it is a hardship created by law for the public good, and the courts of law are prohibited from granting any relief against it.

Nor is it altogether certain that the receivers of such notes are free from blame, although not privy to the actual making or antedating of them. The laws of the government are presumed to be known by all the citizens. If the notes were in fact made or issued after they were declared void by statute, and after a penalty is expressly enacted against the receiver; yet the act of receiving was necessary to enable the offender to pass them, and in this view the receiver may be considered as having aided in the offence of passing. Nor is it improbable

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that the legislature contemplated the punishment of the receiver, when they took from him all power of coercing payment of such notes in the courts of law. But be this as it may, whether the plaintiffs in this action are innocent or not, to authorize them to maintain a suit, and recover judgment on notes of this description so situated, when the legislature has declared them to be utterly void, would be effectually to annul an act, the wisdom and policy of which the legislature alone had the right to determine.

Nor is it a novel doctrine that a person shall be permitted to avoid his contract by alleging his own criminality, provided it consists in the violation of some positive statute of the government. Contracts, the consideration of which is money won at play, or loaned at unlawful interest, have always been subject to the same rule, not only against those who participated in the offence, but even against innocent indorsees, when they have claimed the performance of such contracts.

The case of Lowe v. Waller, 2 Doug. 736, shows this long to have been the law in England; and it is understood that the like principle has been uniformly adopted and practised upon by the courts in this country.

It has ben suggested by the counsel for the plaintiffs in the close of their argument that, to make this a good defence, it should have been specially pleaded. But it is not necessary; for in assumpsit. everything which destroys the right of action may be given in evidence under the general issue.

Indeed, there seems to be no room to doubt upon this question; and nothing but a reluctance to permit a man to avail himself of a falsity in circulating these notes, and afterwards to avoid payment by showing the truth, could have caused a hesitation at the trial.

The verdict must be set aside, and a new trial granted.

PATON v. COIT.

Supreme Court of Michigan, October, 1858.
5 Mich. 505.

Assumpsit against the acceptors of a bill of exchange given for intoxicating liquors sold in violation of the Prohibitory Liquor Law, which makes such paper "utterly null and void against all persons, and in all cases, excepting only as against the holders, . . . who may have paid therefor a fair price, and received the same upon a valuable and fair consideration, without notice or knowledge of such illegal consideration." The plaintiffs were indorsees of the payees.

On the trial, the acceptance having been given in evidence, the plaintiff rested. The defendant then introduced a witness, and being required to state what he expected to prove by such witness, stated that he expected to prove that such acceptance was given in payment and as security for ten barrels of intoxicating liquor, called whiskey, purchased by defendant, of the drawers of said draft, on the thirtieth day of March, 1857, in Detroit.

The plaintiffs objected to such evidence, upon the ground that under the exception in section two of the Prohibitory Liquor Law of 1855, the presumption was that said draft was in the hands of bona fide holders, to wit, the plaintiffs; and that the onus was on the defendant to show, or propose to show, notice before said testimony could be received. The court sustained the objection, and refused to allow the testimony to be given; and defendant excepted.

Judgment having been rendered for plaintiffs below, for the amount of the acceptance, the defendant brought the case to this court by writ of error.

Christiancy, J. Whether the evidence in this case was properly rejected, does not depend upon the question, Whether, standing alone, it would have constituted a complete defence against the draft in the hands of a bona fide holder for value; but, Whether it would have been sufficient to throw upon the plaintiff the burden of proving himself to be such bona fide holder; or, Whether, in fact, the evidence tended, prima facie, to establish a defence.

It is assumed by the counsel for the defendants in error (plaintiffs below) that the only effect of the statute in reference to negotiable paper given for liquors sold, "is to render such paper without consideration as between the

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immediate parties," and that "the effect of the exception in section two is simply to put this statute equity on a footing with all other equities, between the original parties to negotiable paper."

If this be the only effect of the statute, then, according to the prevailing current of recent decisions, the evidence was properly rejected, though the cases upon this point are by no means uniform; and we do not wish to be understood as giving any opinion upon the question presented by this hypothesis, as we do not think it involved in the present case.

The defence here proposed was not merely the want, but the illegality of consideration; and this being allowed as a defence between the original parties, irrespective of and even contrary to the equities of the parties, cannot, without perversion of language, be called an equity. It is not on the defendants' account that such a defence is allowed, as will more fully appear in the sequel.

The effect of the statute in question is not merely to render such paper without consideration, but absolutely void and illegal, between the immediate parties, and all others who have not obtained it for value, and without notice,—not only void in the negative sense of having no legal basis, but affirmatively illegal as violating the positive provisions of the statute. It was not even contended that the facts offered to be shown by the defendant would not have made a prima facie case of an illegal sale, without showing that the sale did not come within any of the exceptions of the statute; and if the plaintiffs claimed to maintain the validity of the sale under any such exception, the burden of proof (this being a civil case) rested upon them to bring it within the exception.

Now, upon principle, as a question of statute construction, and without reference to any authority, when the statute expressly declares all such paper void and illegal, and forbids any action to be brought or maintained upon it, "except when brought by a bona fide holder who has received the same upon a valuable and fair consideration without notice or knowledge," etc., it would seem to follow as a logical necessity, that when the paper is shown to have been given for such illegal consideration, the plaintiff's right of recovery is cut off by the general prohibition of the statute, unless, in avoidance of those facts which alone can bring him within the exception.

We do not propose to give a definite opinion upon the point, whether, the illegality being first shown, the burden of proof in this case would have rested upon the plaintiffs to show actual want of notice; this might be requiring actual proof of a negative. But we are inclined to the opinion that they should have shown the nature of the transaction accompanying the transfer; and if that disclosed no suspicion of such notice, it might make a prima facie case of want of notice, and throw upon the defendant the burden of proving notice. But the amount of the consideration given by the plaintiff is distinct from the question of notice, and the absence of such consideration, in such a case, would be a defence, though the paper had been taken by the plaintiff without notice. The amount of consideration given by the plaintiff is an affirmative fact peculiarly within his own knowledge, and not generally in that of the defendant, and being necessary to bring the plaintiff's case within the exception of the statute, should be proved by him. To allow him to recover without such proof would be an evasion of the statute. Such proof (the illegality being first shown) is a necessary part of the plaintiff's case, which he shows no prima facie right to recover; and though, in ordinary cases, this fact would be presumed in favor of the holder, this presumption can never be allowed without proof when the paper was absolutely void between the original parties, on the ground of fraud, illegality or duress.

This construction of the statute is sustained by authority. In England, by the statute of Anne, a note or bill given or indorsed upon a usurious consideration was void, even in the hands of a bona fide holder for value. Chitty, Bills, 8 Am. ed., 110. But the Stat. 58 Geo. III. c. 93 made such note valid in the hands of a bona fide holder for value without notice. In the case of Wyat v. Campbell, Mood. & M. 80, where the note had been indorsed by a previous indorser,

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upon a usurious consideration, and no notice given to plaintiff to prove consideration, it was contended that the plaintiff was not bound to prove it. But, by Lord Tenterden, C. J.: "The statute 58 Geo. III. c. 93 makes a note tainted with usury valid in the hands of a bona fide holder. The onus is, therefore, upon the holder to prove he is such, otherwise the statute does not apply, and the note is void under the statute of Anne."

In that case, it is true, the exception was in a subsequent statute; here it is in the same statute; but we are unable to perceive how this can make any difference as to the burden of proof. If the fact was not to be presumed in that case, it cannot be in this.

But whether this conclusion be right or wrong as depending purely upon a question of statute construction, can make little difference in this case. The rule as to the burden of proof is the same upon principle and authority at common law. Whenever the consideration of the paper between the original parties has been illegal, especially if in violation of a positive prohibition of statute, proof of such illegality throws upon the holder the burden of proving that he got it, bona fine, and gave value for it. Northam v. Latouche, 4 Car. & P. 140; Bailey v. Bidwell, 13 Mees. & W. 73; Harvey v. Towers, 6 Exch. 656; Smith v. Braine, 16 Q. B. 201; Fitch v. Jones, 32 Eng. Law & Eq. 134; Vallet v. Parker, 6 Wend. 615; Edwards, Bills, 686, 687; Chitty, Bills, 11th Am. ed. 661, 662; Story, Bills, § 193.

The rule is the same as to the burden of proof, where it is shown that the paper was obtained by fraud or duress, and when stolen, or put in circulation by fraud. See authorities above cited, and Mills v. Barber, 1 Mees. & W. 425; Holme v. Karsper, 5 Binn. 469; Aldrich v. Warren, 16 Me. 465; N. Y. & Va. State Stock Bank v. Gibson, 5 Duer, 574. In fact, many of the cases, and most of the elementary works, place illegality in the same category with fraud or duress, as casting the burden of proof upon the holder.

But, while the result is the same, it is manifest that the basis of the rule in the case of illegality, though equally solid, is quite different. In the case of duress and fraud, as well as where the paper has been stolen, the equities of the defendant constitute the basis of the rule. But in the case of illegality of consideration, both parties are generally equally in fault; and it is not to protect the equities of the defendant, but on broad grounds of public policy,—to uphold the law, and to discourage its violation or evasion,—that the burden of proof is cast upon the plaintiff. It is as much the duty of courts to discourage the violation or evasion of law as to protect the equities of parties. And it is upon this principle only that the naked defence of illegality is allowed. See opinion of Lord Mansfield, in Holman v. Johnson, 1 Cowp. 341. And, upon this principle, courts should be careful to avoid doing anything to facilitate the enforcement of such contracts, unless it appear affirmatively that the plaintiff is not in fault, and that he has real equities to be protected.

The evidence offered was improperly rejected. The judgment must be reversed, and a new trial granted.

All the justices concurred.

WHEELER v. GUILD.

Supreme Court of Massachusetts, October, 1838.

20 Pick. 545.

The case is stated in the opinion of the court.

Shaw, C. J. The facts of this case present a very important question for the consideration of the court. Whatever affects the negotiability and the free currency of promissory notes and bills of exchange is of the utmost importance to a mercantile community, the business of which is to a great extent transacted through the medium of these instruments.

The facts which may be deemed material are these: The plaintiff became the holder of the note in question by regular indorsement for valuable consideration, soon after it was made, being a note dated September 1, 1833, payable in three years, with interest, and the last indorsement being in blank. Within a year from

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the date of the note, to wit, in March, 1834, the plaintiff, John Wheeler, as three promissory notes, one to Brigham & Goodrich, attorneys and partners, in Worcester, one to Tappan & Co., and one to Stewart & Co., of New York, for both of which parties Brigham & Goodrich were agents and attorneys. On that occasion, the plaintiff, John Wheeler, delivered to Brigham & Goodrich, as collateral security to his three joint and several promises, the note in question, indorsed in blank, and took their receipt, specifying that it was so received, and to be by them held, as collateral security for the payment of those notes. In September, 1835, these three notes had been fully paid. Though Brigham and Goodrich were in partnership as attorneys-at-law, yet Brigham was engaged in much other business, and had many separate negotiations, and the business in question had been done in the partnership name, but in fact by Goodrich. In December, 1835, the plaintiff applied to Goodrich for the note, who then produced and exhibited it from a file of private papers, where it had been kept by him, and he would then have given it up to the plaintiff, but the plaintiff had not his receipt with him to exchange for it. In the meantime, before this application of the plaintiff to Goodrich, viz., on the 28th of November, 1835, Brigham had received of Stafford, one of the firm of A. H. Guild & Co., and one of the defendants, $500 to pay the note in question, describing it as a note payable September, 1836, and gave him a receipt, in his separate name, signed D. T. Brigham, stating that the $500 had been received in full payment of the note, and the note to be delivered up to Stafford. Soon after the application of the plaintiff to Goodrich above stated, viz., about the 24th of December, Stafford, one of the defendants, producing Brigham's receipt, applied to Goodrich for the note, who declined giving it, on the ground that Brigham had no right to receive pay for and discharge the note; and by mutual consent it was placed in the custody of a gentleman, for the use of the party having the better title to it, by whom it was produced in this court on the trial.

Some inferences are to be drawn from this evidence, which may have a bearing on the case; but we think they are plainly deducible from the circumstances stated, and they are these: That Goodrich did not assent to the payment received by Brigham, and did not in fact know of it till after he had been applied to by the plaintiff for the note; that Goodrich had the actual possession and custody of the note; and that, at the time that Brigham received the money and gave the receipt, he not only did not produce or exhibit the note, but that he had not the actual custody of it, nor was it so amongst the partnership papers as that it was in the actual joint custody of the parties as partners. If he had it in his possession, or had regular access to it in the ordinary way of business, there is no reason why he did not deliver it up to Stafford, instead of giving him a receipt, and a promise to deliver it.

The law in regard to bills of exchange and promissory notes is so framed as to give confidence and security to those who receive them for valuable consideration, in the ordinary course of business, when payable to bearer or indorsed in blank, so as to be transferable by delivery; and in general a party taking such a bill under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signature and indorsements. So that if such a bill or note be made without consideration, or be lost or stolen, and afterwards be negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of business, his title is good, and he shall be entitled to receive the amount. Miller v. Race, 1 Burr. 452; Peacock v. Rhodes, 2 Doug. 633; Grant v. Vaughan, 3 Burr. 1516. The credit which the law thus attributes to notes and bills of exchange which are transferable by delivery arises mainly from the confidence inspired by the actual custody and possession, and the actual delivery of the security upon such negotiation. To so great an extent is this principle carried, that in regard to banknotes, and in most respects in regard to all other bills and notes transferable by delivery, the title and the possession are considered to be inseparable. And it will be presumed that the party thus in possession of a bill holds it for value, until

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the contrary appears; and the burden of proof is on the party impeaching the title. Collins v. Martin, 1 Bos. & Pul. 648.

But these rules are adopted with this limitation, that the party thus taking the note or bills does it in the ordinary course of trade, when not overdue or otherwise dishonored by anything apparent upon the face of it, and without notice that it had been lost or stolen, or that the holder had obtained it wrongfully, or had no just right to receive it in the way of business. Patterson v. Hardacre, 4 Taunt. 114. If one takes a note or bill with actual notice that it has been lost by the owner, he cannot hold it against the true owner. Lovell v. Martin, 4 Taunt. 799.

It has been argued that where a party has a legal title by indorsement and delivery, and the actual possession of the bill or note, although he holds without any just right to negotiate or collect it, still, as he has a legal title, a transfer from him will vest a legal title in another, and authorize such other to take for his own use. But this consequence, we think, does not follow. The true ground is expressed by Eyre, C. J., in the case above cited, Collins v. Martin. . . . The same reasoning applies to other cases, where a party has the custody of a bill, without any just right or lawful authority to collect or negotiate it, as where it has been lost or stolen, or embezzled from the true owner, or intrusted to an agent, for a special purpose only; if these facts are known to the party receiving it, he is in privity with the party from whom he receives it, and cannot be heard in a court of justice, though having a legal title to enforce an inequitable and unjust demand. Such a case is not within the reason of the rule, which is designed only to protect bills and notes when taken in good faith, in the course of business. If a note is paid, not in the usual course of business, or to a person having the custody, but not authorized to receive payment, and that known to the party paying, though the note be given up, it is no discharge against the true owner. Kingman v. Pierce, 17 Mass. 247.

So payment of a bill or cheque, before it is due, will not be a discharge unless made to the real proprietor of it; and therefore where a banker, contrary to usage, paid a cheque the day before it bore date, which had been lost by the payee, it was held that he was liable to repay the amount to the person losing it. Da Silver v. Fuller, Sel. Cas. 238, cited in Chitty, Bills, 6th Eng. ed. 148. In this case, although the holder had the legal title arising from the possession of the cheque, yet he was not bona fide the holder with authority to collect, and, as the banker paid it out of the usual course of business, he paid it at the risk of being obliged to pay it again, if the party presenting it had not just right to receive it.

Most of the same principles and reasons apply alike to transfers and to payments. We think the rules deducible from the cases are these: Where a party takes a bill transferable by delivery, not overdue nor otherwise apparently dishonored, for valuable consideration, in the usual course of business, and without notice, actual or constructive, that the holder came by it unlawfully or without title, and has no just right to collect and receive it, the party taking it shall hold it as a valid security, notwithstanding that it has been lost by the true owner, or stolen from him, or taken by the holder as a mere agent to keep, or for other special purpose, without any authority to collect or transfer it; otherwise he shall not be deemed to have a good title to hold and enforce payment of it or to withhold the bill itself or the proceeds of it from the party justly entitled. Bleaden v. Charles, 7 Bing. 246. The same rule applies to payments; if a bill be paid at maturity, in full, by the acceptor, or other party liable, to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But in both cases faith is given to the holder mainly on the ground of his possession of the bill, ready to be surrendered or delivered, and the actual surrender and delivery of it upon the payment or transfer. If, therefore, upon such payment, the holder has not the actual possession of the bill ready to be delivered, and does not in fact surrender

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it, but gives a receipt or other evidence of the payment; and if it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person had such right, the payment will not discharge the party paying, but will be a payment in his own wrong; he must pay the bill again to the right owner, and must seek his redress against the party receiving his money, on the pretence that he had a right to receive it as the holder of the bill, when in fact he had no such right.

Applying these principles to the present case, the court are of opinion that the payment made by Stafford to Brigham, under the circumstances, did not operate as a payment and discharge of this note, and that the plaintiff is entitled to recover.

The plaintiff was the holder of this note by indorsement, before it was pledged to Brigham & Goodrich, and had the complete legal and equitable title to it, and the whole beneficial interest in it. Being transferable by delivery, when transferred to Brigham & Goodrich, they took the legal title, with a right to collect it, and apply the proceeds to the payment of the notes, for the security of which it was pledged, if they should not be otherwise paid. But when those notes were paid, all right of Brigham & Goodrich to transfer or collect it ceased, and they had the mere naked possession of it for the plaintiff, to be surrendered on demand. Now whatever might have been the effect of an actual surrender and delivery of this note to one of the promisors, on receiving payment, it is very clear that, according to all the rules applicable to this subject, without surrendering and delivering up the note, the payment must be considered as made at the risk of the party paying; and, as the party receiving in fact had no right to receive payment, such payment and receipt did not discharge the note, as against the true owner. It is not necessary to consider whether Brigham was acting in his partnership capacity or not; because, after the purpose was accomplished for which the note was pledged to the partners, they had no just right or lawful authority to transfer or collect the note as against the plaintiff. If they had jointly transferred it in the due course of business, although their transferee without notice might have held it, it would be in virtue of the law which protects such transfers to a party without notice, in order to give effect to the currency of bills and notes, and not because Brigham & Goodrich had any right or lawful authority. If therefore they had given a transfer in writing with a promise to deliver the note, not delivering or producing it, no title would have passed as against the plaintiff, because such transfer without delivery would not be within the reason or principle of the rule.

But we think the other point is equally decisive. Brigham not only did not produce or exhibit the note, but he had not the actual custody or possession of it. surety, joined with Daniel G. Wheeler in He did not profess to act for the partnership, but signed the receipt in his own name. Had Brigham and Goodrich, as partners, been the true holders of the note, or if they had had a joint authority to collect it, it may well be admitted that the act of one or the receipt of one would bind both. But all the right and authority which they ever had over the note, except to give it back to the plaintiff, agreeably to their contract, had ceased. A receipt of one therefore in his own name, and not purporting to be for the use of both, was not within the scope of the partnership authority, and did not bind his partner. The defendant Stafford gave credit to Brigham only. For though his receipt purports to be not merely executory, but a present discharge of the note, yet as he had no authority to discharge it, either by himself, or for himself and partner, and as he had not the note to surrender and give up, the legal effect and operation of his receipt was an executory undertaking that he would procure a discharge of the note and surrender it. The consequence is, that Stafford paid his money to the wrong person, and must look to him for an indemnity.

Besides, the note was not paid in the due course of business. It was paid many months before it was due; the full sum was not paid, there being more than

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two years' interest due on the notes, which was wholly relinquished; no notice was given to Goodrich, the partner who transacted the business of taking these notes, and giving the receipt for them, and who had the actual custody of this note, all of which would be strong evidence to go to a jury, to establish the fact of constructive notice to Stafford that Brigham had no right, either in his own name or as a partner with Goodrich, to receive payment of, or to discharge this note. But the other grounds are sufficient, without relying upon these circumstances.

The grounds upon which the court place their judgment are these: The plaintiff had once a good title to the note. It was delivered to Brigham & Goodrich, for a special purpose, which was accomplished. After that, Brigham & Goodrich had a mere naked custody of the note for the plaintiff and had no right or lawful authority either to negotiate or collect it; a fortiori, Brigham alone had no such authority. The defendant, Stafford, was not lawfully called upon to pay Brigham, as having the possession and custody with a prima facie title, because he had no such custody or possession, and the note was not due. Stafford was not deceived into taking the note by the production and delivery of it, because it was not delivered or produced; if he paid it therefore to Brigham, without having [taken] up his note, he did it on the faith that Brigham had good right to receive payment and discharge it, and of course under the liability to pay it over again to the rightful proprietor, if Brigham had not such right. In fact and law, Brigham had no such right, but the plaintiff was at the time the rightful proprietor, and of course the defendants obtained no discharge by such payment, but upon the maturity of the note they were bound to pay it to the plaintiff. The note having been put by Mr. Goodrich into the hands of a common friend, for the use of the party entitled, and the plaintiff having himself entitled, the note was rightly brought in by the person to whom it was thus intrusted, as evidence for the plaintiff.

Judgment for plaintiff.

HASCALL v. WHITMORE.

Supreme Court of Maine, April, 1841.

19 Maine, 102.

The case is stated in the opinion of the court.

Shepley, J. The plaintiffs are joint owners of a negotiable promissory note purchased before it became payable. One of them is a holder for value without notice; the other with notice, but deriving his title through others who were bona fide holders without notice. As between the original parties the note may be regarded as made without consideration. Andrews, who was the first and an innocent indorsee for value, did not indorse it when he disposed of it, and he was properly admitted as a witness. Whitaker v. Brown, 8 Wend. 490. He could have collected it, for the want of consideration could not be set up against him. A knowledge of the facts acquired afterward would not affect his rights. He had not only a legal right to hold and collect it, but to negotiate it. And the maker could not impair that right by giving notice that it was made without consideration. Nor would he be injured by a transfer to one having a full knowledge of the facts; for his position would not be more unfavorable than before.

Bayley states that the want of consideration cannot be insisted upon "if the plaintiff, or any intermediate party between him and the defendant, took the bill or note bona fide and upon a valuable consideration." Bayley, 550 ed. by Phillips & Sewall.

The case of Thomas v. Newton, 2 Car. & P. 606, was assumpsit on a bill drawn by Wilson on the defendant and accepted, and by him indorsed to Dandridge and by him to the plaintiff. The defence was a want of consideration. Lord Tenterden says: "If the defendant shows that there was originally no consideration for the bill, that throws it on the plaintiff to show that he gave value for it, or that value was given for it by Dandridge; for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover: otherwise the defendant is entitled to recover."

In Solomons v. The Bank of England,

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13 East, 134, 135, note b, it appeared that the bank-note had been obtained fraudulently from Batson & Co., who informed the bank of it. The plaintiff as holder claimed payment of the bank, and it was refused. He had received the bill of Hendricks & Co.; and it did not appear that he paid value for it before notice. Lord Kenyon says: "Upon this evidence I think Solomons must be considered to be in the same situation as Hendricks & Co." But as it did not appear that they were holders for value without notice, the plaintiff did not recover.

In Smith v. Hiscock, 14 Maine, 449, where a negotiable promissory note had been indorsed bona fide and for value before it was payable, the Chief Justice says: "The want of consideration is not an available defence against a subsequent holder, to whom it may have been passed after it was due. The promise is good to the first indorsee free from that objection; and the power of transferring it to others with the same immunity is incident to the legal right which he had acquired in the instrument. By the first negotiation the want of consideration between the original parties ceases as a valid ground of defence."

If the relations between the maker and the holder only were to be considered, the want of consideration would be a good defence against one who did not purchase for value, or who did so after it was once due. And yet it has been decided that one so situated may avoid that defence by showing that it could not have been interposed against a prior holder. The same principle appears to be equally applicable to a holder who has purchased with notice. If the relations between himself and the maker only were to be considered, he could not recover; but purchasing of one who had no notice, he must be considered to be in the same situation and as entitled to the same protection.

Defendant defaulted and judgment for amount due on the note.

PUTNAM v. SULLIVAN.

Supreme Court of Massachusetts, March, 1808.

4 Mass. 45.

Case by the indorsees against the indorsers of a promissory note, dated December 1, 1804, payable to the defendants or their order. The action was tried at the last November term, before Parker, J., when a verdict was given for the plaintiffs for the amount of the note and interest, subject to the opinion of the court, whether, upon the facts proved, and which were to be reported to the judge, the action could be maintained. If the court should be of that opinion, judgment to be entered according to the verdict, with additional damages for interest to the time of the judgment; if the court should be of a different opinion, a new trial to be granted.

Those facts were in substance that the note was payable in ninety days from the date with grace; that the plaintiffs were innocent indorsees, having received the note indorsed in blank, and paid a valuable consideration for the same. The handwriting of the promisor and indorsers was admitted, the latter being the handwriting of W. B. Sullivan, a partner of the house doing business under the firm of Jno. L. Sullivan & Co. The note being lodged in the Boston bank for collection, notice was left at the lodgings of the promisor by the messenger of the bank, on the 28th of February, 1805, and on the 3d of March following the said W. B. S., one of the indorsers, was notified that the note was unpaid. It was also in evidence that the promisor had absconded before the note fell due, and that this fact was known to all the parties at the time.

One of the defendants being abroad in Europe, and the other, about the 1st of December, 1804, having occasion to make a journey from Boston to Philadelphia, intrusted with an apprentice or clerk of the house a number of papers, on which one of the house had written the name of the firm in blank, some to be used as notes indorsed by the house, and others

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as notes in which the house were to be promisors. These papers were intrusted to a clerk of the defendants, to be used when money was to be advanced on the sale of goods by the house on commission, or to renew the notes of the house when due at the banks. The clerk was directed to be careful of the blanks left with him, and not to use any for the advance of money on the sale of goods on commission without consulting a brother of the partners. He was further directed to deliver one of the blanks to the promisor upon the note sued in this action, to enable him to renew a note signed by him then in the bank, of which the house were indorsers, and for which he had requested a blank to be left. The promisor called on the clerk for the blank indorsement left for him, and one was delivered to him; afterwards, pretending that by some mistake it had become useless to him, and feigning to burn, in the clerk's presence, the name of the firm indorsed, procured another blank, and by a similar pretension and contrivance he obtained a third and a fourth blank indorsement, the last of which was in fact used for the purpose, for which the house had directed a blank indorsement to be given him. The promisor had used one of the prior blank indorsements for making the note sued in this action; which had been negotiated, with the indorsement remaining in blank, to the plaintiffs.

Parsons, C. J. [Question of want of demand on the promisor here considered, the court holding that demand was not necessary to hold the indorsers, the promisor having absconded.]

The second objection is, that the defendants did not, in construction of law, indorse this note.

On the facts in this case we are to decide who shall suffer the loss of the money,—the plaintiffs, who, it is agreed, are innocent indorsees, or the defendants.

It is objected that this note ought to be considered as a forgery of the names of the indorsers; because a note was afterwards written on the face of the paper by the promisor, not only without the direction or consent of the defendants, but against their express instruction; and therefore that it was a false and fraudulent alteration of a writing, to the prejudice of the indorsers.

This objection would have great weight, if, when the indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretences had obtained it, the fraudulent use of it would not be a forgery; because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements, (although his discretion was confined), as a delivery by one of the house; whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself and to his principals.

It is further objected that, if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases where the indorser, through fraudulent pretences, has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of this description, but a different note, and for a different purpose.

Perhaps there may be cases in which this distinction ought to prevail; as if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with

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any laches or neglect, or misplaced confidence in others. Here one of two innocent parties must suffer. The indorsees confided in the signature of the defendants, and they could have no reason to suppose that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the indorsers, they were answered, on the information of the promisor, whose character then stood fair, that blank indorsements had been left with the clerk, and that the indorsers had before indorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or too inexperienced to guard against the arts of the promisor. It is to be regretted that the blank indorsements had not been deposited with the brother of the partners, who was directed to be consulted as to the use of them; for then no innocent person would have been a sufferer.

From a view of all the facts, as they are presented to us, it is our opinion that the indorsers must be holden, and that judgment must be entered according to the verdict, with the additional interest agreed.

In forming this opinion, we have been necessarily led to consider the effect of a different opinion on the commercial part of the community. How far it is common for merchants to intrust their clerks with blank signatures or indorsements, is not known. But when merchants are in the habit of indorsing for each other at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes, when they become due. And if the party having these signatures should employ them as names to other negotiable securities not contemplated, and the signatures should for that reason be void, much injury might result to innocent indorsers, or the bank discounts would be greatly embarrassed.

SMALL v. SMITH.

Supreme Court of New York, October, 1845.

1 Denio, 583.

Assumpsit upon a negotiable note, signed by the defendant as surety for accommodation of the maker. Defence, fraudulent diversion, and that the plaintiff took the note with knowledge. Verdict for the plaintiff, upon instructions to the jury to which the defendant excepted. Motion for a new trial, for misdirection. The facts are detailed in the opinion.

Beardsley, J. If the evidence given on the trial was true, and that was for the jury to determine, it is perfectly clear that the note was delivered to the plaintiffs in violation of the agreement upon which it had been indorsed by the defendant. The plaintiffs, therefore, were not entitled to recover, unless they received it bona fide and upon a valuable consideration. Both were necessary. It must have been received in good faith, without notice of the arrangement on which the indorsement had been made, and the transfer must have been upon what the law regards as a valuable consideration. These principles admit of no dispute; and although, upon some points of commercial law in close proximity to those I have stated, discordant opinions may be found, Stalker v. McDonald, 6 Hill, 93; Swift v. Tyson, 16 Peters, 1, there is entire harmony as to those I have mentioned.

The judge charged that, if the plaintiffs received the note in payment and satisfaction of a debt due them from Hulburt, the maker of the note, that was a sufficient consideration for its transfer, and they thereby became purchasers for value. This, as a legal proposition, is not questioned; but the bill of exceptions fails to show any evidence to which this principle could be applied. There was no proof which tended to show that the note had been transferred in extinguishment of the debt of Hulburt. The judge, therefore, in my view of the case, erred in submitting that question to the jury.

But I shall not dwell on this point, for the case may be disposed of on the question of good faith.

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It appears by the testimony of Hulburt that he was indebted to the plaintiffs in a sum exceeding the amount of this note, and that Small, one of the plaintiffs, came to Vienna, where Hulburt resided, to secure payment of said debt. Small proposed to Hulburt to give a note at one year with security, and the defendant, who lived in another county, was spoken of for that purpose. Small said he would take the defendant as surety, and it was arranged that, while Small was absent (as he was going West for a few days), Hulburt should go to the defendant's residence in order to obtain him as such surety. Pursuant to this arrangement, Hulburt went to see the defendant, and told him what he wanted. At first the defendant refused to indorse; but it was finally agreed between them that he would indorse the note upon condition that one Austin, who then held a note given by the defendant, should deposit the same with a third person, there to remain until the defendant should be discharged from said indorsement. The note in question was accordingly signed by Hulburt and indorsed by the defendant; but it was not to be transferred to Small, or used in any manner, until the one held by Austin had been deposited under said arrangement. Hulburt returned with the note to Vienna, where Austin lived, and told him of the arrangement under which the indorsement had been made. Austin declined to comply with that arrangement; but Hulburt, as he states, left the note in suit on Austin's table, and did not see it again until Small had returned to Vienna. Hulburt first saw Small after his return at Austin's office, where, on arriving at the office, according to the testimony of Hulburt, Small said to him, "We have fixed that matter, and Mr. Austin has let me have the note." The witness then inquired of Austin, in Small's presence, in what manner the note had been turned out, and whether the arrangement of the defendant had been complied with, to which Austin made no answer; but Small said he had prevailed on Mr. Austin to indorse the note, and he had got it. This, according to the witness (Hulburt), was all which passed at that time. Another witness (Paul), who was present, said the remark of Hulburt to Austin was that he supposed he had not turned out the note without complying with the request of Mr. Smith, the defendant, to which Austin made no answer; but Small said he had prevailed on Mr. Austin to indorse the note, and had released Mr. Smith.

It is not material which of these witnesses was correct as to the form of the remarks made at the time. Both come to the same result; for what was said, according to the statement of either witness, was full notice to Small that the indorsement had been procured upon some arrangement or condition which had not been complied with. Here, then, Small had actual notice that the indorsement was conditional; and, if the note was subsequently transferred to him, he would necessarily take it subject to that condition. When this notice was given, the note was in Small's hands. He had received it, as he said, of Mr. Austin. But it cannot be pretended he had received it of Austin upon any consideration moving between them. Indeed, the first remark of Small to Hulburt, and all that was said on that occasion, goes to show that whatever might have been done by Austin had been done for Hulburt, and not for himself, and in furtherance of the negotiation which had been commenced between Hulburt and Small. It is not shown that Austin had authority from Hulburt to transfer this note to Small on any terms, although it may be inferred that he was authorized to do so, on complying with the condition upon which the defendant's indorsement had been made. Small did not set up that he had received the note as the property of Austin, and the whole transaction shows he did not. He could not, therefore, upon the facts as disclosed by the witnesses, pretend that he had acquired title to the note in any manner before he was apprised by Hulburt that the indorsement was made on a condition which had not been performed. It is more a matter of inference than of anything like direct proof, that Hulburt at any time assented to the transfer of the note to Small; but if he did so, after notice to Small of the condition on which the indorsement had been made, it is plain that

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the plaintiffs ought not to recover, as the condition has never been performed. If the plaintiffs claim as purchasers of the note from Austin, they are met by two objections; first, Small, one of the plaintiffs, was aware that the note belonged to Hulburt, and not to Austin; and, secondly, it is not shown that the plaintiffs paid or advanced anything to Austin, or that any consideration passed between them for the transfer of the note. And as to Hulburt, if he assented to the transfer of the note to Small, it was after explicit notice that the indorsement was conditional, as is proved by the testimony of both Paul and Hulburt. Had the case been put to the jury upon the point of notice, with suitable explanations, there is no doubt what the verdict should and would have been, unless these witnesses were wholly discredited. I think the case was not so submitted to the jury, and that it should be sent back for a new trial.

New trial granted.

LANDLORD AND TENANT CASES

MILLIKEN v. THORNDIKE.

103 Mass. 382.

Contract to recover rent of a store on Congress Street in Boston, under the covenants in an indenture of lease dated October 1, 1867, by which the premises were demised by the plaintiff to the defendants. The answer denied that the defendants had executed the indenture, and alleged that, if they had done so, they had been induced thereto by the false and fraudulent representations of the plaintiff. Trial in the Superior Court, before Morton, J., who, after a verdict for the defendants, allowed a bill of exceptions, of which the material part was as follows:

"The plaintiff proved the execution of the lease, and that the rent, becoming due according to the terms of the lease, for the quarters ending December 31 and March 31, was demanded and not paid.

"It appeared that the store upon the leased premises had been recently built for the plaintiff, and completed about the latter part of September; that, before the building was completed, the defendants had by parol arranged with the plaintiff to hire the building, and had been shown the plans thereof; that on October 1, 1867, they entered into possession; and that, some weeks after this, the plaintiff brought to them the lease to be executed. The defendants contended that they had been induced to sign the lease by false and fraudulent representations made by the plaintiff, and introduced evidence tending to show that, when the plaintiff brought the lease to be signed by them, a communication was had with him. The plaintiff objected to the admissibility of this conversation, but the judge ruled that it was competent under the pleadings. Three witnesses testified to the conversation, whose statements differed somewhat as to the exact language used. The substance of their testimony was as follows: The plaintiff brought in the lease, and asked the defendants to sign it. The defendants said that they were not satisfied with the way the store was built, that it had settled and was not properly built and was not safe; and declined signing the lease. The plaintiff replied that it was built according to the plans in every particular. The defendants asked if the drains were where they were to be according to the plans. After some further communication, the defendants said, 'If the store is built according to the plans, we ought to sign the lease,' to which the plaintiff replied, 'It is built according to the plans in every particular;' whereupon the defendants executed the lease.

"It appeared that, about a week after the lease was executed, the partition wall between this and the adjoining store settled, a portion of the front wall fell in, and the building became unfit for use, and dangerous, and the defendants at once moved out, obtaining a store elsewhere, and had not since occupied the leased premises.

"The defendants also introduced testimony tending to show that the store was not built according to the plans; particularly that the drain to empty the water-

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closets was not built as laid down in the plan, but much nearer the partition wall, and in some places was lower than the foundation of the wall, and thus caused or contributed to the settling of the wall. There was contradictory testimony as to the construction and erection of the plaintiff's drain, and as to whether its construction contributed to the settling of the wall. It did not appear by any direct testimony that the plaintiff knew where the drain was constructed, or anything in regard to its construction, till after the accident. The store was repaired and ready for occupancy in about a month after the accident.

"The judge instructed the jury that, if the defendants were induced to execute the lease by representations made by the plaintiff of material facts which were false, they would be entitled to avoid the lease upon proving, either that the plaintiff knew them to be false when he made them, or that the plaintiff, with a view to induce the defendants to execute the lease, positively affirmed them as of his own knowledge; that, whatever the language used, if it was intended only to express a belief or opinion founded upon information or other sources, it was not sufficient, but that the plaintiff must have intended and been understood by the defendants to affirm that he knew the facts of his own knowledge."

Colt, J. The defense relied on in this case is fraud, and the conversation had at the time the lease was executed was admissible upon the issue raised.

The jury have found that the defendants were induced to sign the lease by a false representation, made by the plaintiff, of a material fact, which he either knew was false when he made it, or positively affirmed as of his own knowledge. It is objected that the evidence did not justify this finding, because it is apparent, from the subject matter, that the representation made was intended, and should have been understood by the defendants, as only an expression of strong belief. If a statement is honestly made as a matter of opinion, judgment or estimate, it is not in law a false representation, although the matter thus stated should turn out to be untrue. But if a fact which is susceptible of knowledge is stated by a party as of his own knowledge, and such representation is relied upon as the basis of a contract, and damage results to the party deceived, it is a legal fraud, the consequences of which must be borne by him who makes the statement. The representation in this case was of the latter description. It was of a fact, the existence of which was not open and visible, of which the plaintiff had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury. Page v. Bent, 2 Met. 371, 374.

The plaintiff further claims, in his argument, that the defendants cannot set up this defence in an action for rent due by the covenants in the lease; that the remedy is by action of deceit, to recover damages for the one month's time during which they were prevented from occupying the warehouse; that the lease was a good lease until avoided by the lessees, and the contract was an executed one.

The defence goes to the original execution and validity of the lease containing the covenants to pay rent. If consent to it was obtained from the defendants by fraud, then it was not such real and free consent as gives it validity. The false statement by which it was procured must, indeed, be of some matter which is an essential element in the agreement, which goes to the substance of it, and upon which the consent was based. If it be of this material character, then there is no mutual assent to the contract, and the party deceived may rescind, provided he does it on discovery of the fraud, and returns to the other party everything of value which he has received under it. If the contract has been wholly executed on both sides, and the party injured cannot restore the other to his previous condition, the only remedy at law is by action for the deceit, or by recoupment of damages. But the mere possession of property which was the subject matter of the contract will not take away the right of rescission, if possession is surrendered as soon as the fraud is discovered. These familiar rules are equally applicable, whether the contract relates to real or personal property. Whitney v

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Allaire, 4 Denio. 554.

It was held by this court, where a sale of certain lands in Maine was effected by false representations, and a deed taken, under which the vendees took possession, that they might rescind the sale, within a reasonable time, by an offer to release to the grantors; and that an offer to release, made after the occupation of the land nearly four years, and the enjoyment of certain benefits therefrom, and after a shift for the purchase money had been commenced, was made in time, and would vest in the plaintiffs their original title substantially as it was before. Holbrook v. Burt, 22 Pick. 546.

In an action to recover rent upon a written lease for three years, when the defendant had occupied the premises for about a year, paying something towards the rent, and then removed, and in which the defence was that the lease was obtained by false representations, it was held in Maine that, although a party may not be able to rescind a contract partly executed, and recover back what he has paid under it, yet the defence was good to an action to compel the further execution of such contract. Irving v. Thomas, 18 Maine, 418.

The case of Feret v. Hill, 15 C. B. 207, cited by the plaintiff, contains nothing at variance with these decisions. That was an action of ejectment, to obtain possession of rooms which had been leased by Hill to Feret, and of which, as lessee, he had been dispossessed by Hill; and the defence was that Feret had obtained the lease by a false representation that he intended to carry on a lawful trade therein, but had converted the premises into a brothel. It is carefully distinguished, in the decision, from a case where the plaintiff is seeking to enforce the stipulations of a contract; and at most it only decided that no intention, existing in the mind of the plaintiff, which could have been repented of in time, and which therefore did not affect the original validity of the instrument, would prevent the demise from taking effect, or give the defendant Hill a right forcibly to expel the lessee for using the premises for an unlawful purpose. The alleged fraud, if any, is admitted to have been collateral, and not of such a character as to defeat the title under the lease.

Exceptions overruled.

DUNLAP v. BULLARD.

131 Mass. 161.

Colt, J. This action is brought by the lessors upon a covenant to pay taxes contained in a lease given in 1855 for the term of twenty-two years, at a fixed rent payable quarterly. The whole interest of the original lessees was transferred by successive assignments to Shepherd Ostrom, who, in 1868, leased the premises with the buildings erected since the date of the original lease to Earl W. Johnson, to hold for a term equal to the whole of the unexpired term of the original lease, but at an increased rent payable monthly. The last-named lease also contained covenants on the part of the lessee to pay rent and taxes, and that the lessor might enter and take possession for breach of covenant, and that the lessee would quit and deliver up the premises to the lessor at the end of the term. This lease was assigned by Johnson to the defendant, who was in possession when the taxes sued for in this action were assessed.

The plaintiffs contend that privity of estate was created between them and the defendant, as assignee of Johnson, by which the defendant became bound in law to perform the covenant to pay taxes contained in the original lease. A covenant to pay taxes is a covenant which runs with the land, and binds those who acquire by deed or assignment the whole estate of the covenantor in the whole or some part of the land. If the whole of the unexpired leasehold estate is conveyed, then the party to whom it is conveyed is bound, whether the conveyance is in form an assignment of the remainder of the term, or is a sub-lease. The test to be applied is whether the lessee has parted with his whole interest in the leased premises.

In the case at bar, the interest which came to the defendant was conveyed by a lease of the premises containing all the agreements and covenants usually found

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in such an instrument. There is no reference in it to the original demise, and no indication of an intention on the part of Ostrom, the sub-lessor, to part with his whole interest in the leasehold estate, or to lose control of it as lessor. He provides that Johnson, the tenant, shall hold under him and pay rent to him and no one else. The rent reserved was larger in amount than that reserved in the original lease, and was payable at different times, and the lessee covenants to deliver up the premises to Ostrom, the lessor, at the end of the term. But what is more in point, the right is reserved to the lessor to enter and expel the lessee for nonpayment of rent, or breach of any of the covenants in the lease. It is clear that the parties to this lease intended to create the relation of landlord and tenant between themselves. And it is the duty of the court to give effect to this intention, unless controlled by some positive rule of law.

To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or, in other words, the whole term; for, in the language of Blackstone, "the word 'term' does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the term may expire during the continuance of the time, as by surrender, forfeiture and the like." II. Bl. Com. 144. The grant of an interest therefore which may possibly endure to the end of the term is not necessarily a grant of all the estate in the term. If by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term.

Where an estate is conveyed to be held by the grantee upon a condition subsequent there is left in the grantor a contingent reversionary interest. It was said in Austin v. Cambridgeport Parish, 21 Pick. 215, 223, that the grantor's contingent interest in such case was an estate which was transmissible by devise and passed under a residuary devise in the will of the grantor. It was declared to be a contingent possible estate, which, united with that of the tenants, "comprised only the entire fee simple estate, as much so as in the ordinary case of an estate for life to A., remainder to B." In Brattle Square Church v. Grant, 3 Gray, 142, 147, it was said, that when such an estate is created, "the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition." These considerations are equally applicable whether the estate subject to the condition subsequent is an estate in fee, or an estate for life or years. They apply where, by the terms of an instrument which purports to be an underlease, there is left in the lessor a contingent reversionary interest, to be availed of by an entry for breach of condition which restores the sub-lessor to his former interest in the premises. The sub-lessee under such an instrument takes an inferior and different estate from that which he would acquire by an assignment of the remainder of the original term, that is to say, an interest which may be terminated by forfeiture on new and independent grounds long before the expiration of the original term. If the smallest reversionary interest is retained, the tenant takes as sub-lessee, and not as assignee.

The law in this Commonwealth is settled by the cases of Patten v. Deshon, 1 Gray, 325, and McNeil v. Kendall, 128 Mass. 245. In the first-named case, Walker, the lessee of Haywood, underlet a portion of the premises to Deshon for the remainder of his term, and then assigned all his interest in the original lease to Patten. It was held that, prior to the assignment to Patten, a substantial interest remained in Walker in all that part of the leased premises which had

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been underlet to Deshon, and which was the right to use and enjoy, for the remainder of the term, that part of the premises let to Deshon, upon a surrender or forfeiture of the sub-lease for nonpayment of rent; and that this interest passed to the plaintiff by Walker's assignment. In McNeil v. Kendall, it was said that the decision in Patten v. Deshon had never been questioned to the knowledge of the court, and had been cited with approval in many cases in our own reports, and laid down a just and equitable rule which had been the law of Massachusetts for more than twenty years.

Judgment for the defendant.

BARTLETT v. FARRINGTON.

120 Mass. 284.

Morton, J. To constitute an eviction which will operate as a suspension of rent, there must either be an actual expulsion of the tenant, or some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises or some part of it, to which he yields, abandoning the possession within a reasonable time. Royce v. Guggenheim, 106 Mass. 201; De Wit v. Pierson, 112 Mass. 8; Mirick v. Hoppin, 118 Mass. 582.

In the case at bar, the defendant occupied the demised premises under a lease for three years, commencing July 1, 1874, until September 26, 1874, when he left the premises. This suit is for the quarter's rent due October 1, 1874. The defendant's evidence tended to show that the plaintiffs from time to time entered upon the premises and gathered the flowers and the annual crops, cut down a partly decayed apple tree, and, on the day when the defendant vacated the house, removed a cooking stove from the kitchen. These were not acts done by the landlord with the purpose and effect of permanently depriving the tenant of the enjoyment of the premises. If they were not justifiable under some agreement with the tenant, they were trespasses for which he has an action at law, but they did not amount to an eviction which excuses him from payment of the rent. The rulings at the trial upon this point were correct.

Treating these acts of the plaintiffs as trespasses, the court rightly ruled that the defendant could not in this action recoup the damages he sustained by reason of them. As stated by Bigelow, C. J., in Sawyer v. Wiswell, 9 Allen, 39, one of the essential elements upon which the right to recoup depends is "that the damages which the defendant seeks to set off shall have arisen from the same subject matter, or sprung out of the same contract or transaction as that on which the plaintiff relies to maintain his action." In this case the plaintiffs' claim is for rent under the covenants of a lease; the defendant seeks to set off damages sustained by a trespass or trespasses. The two causes of action are independent, and do not arise out of the same contract or cause of action, within the principle which allows a recoupment.

Exceptions overruled.

KIMBALL v ROWLAND

6 Gray, Mass. 224

Action on the Rev. Sts. c. 104 to recover possession of premises of which the defendant was tenant at will, at a rent payable quarterly. Writ dated July 22d 1853. The parties submitted the case to the decision of the court upon the following facts:

On the 1st of July 1853 a quarter's rent became due; no demand was made on the defendant for its payment; but the plaintiff on the 5th of July, gave him notice to quit in fourteen days for nonpayment of his rent.

On the 6th of July the defendant tendered the amount of the rent to the plaintiff, who took it, and gave the defendant a receipt therefor, in which he expressly reserved his claim to possession of the premises under his notice; and the plaintiff refused to give any other form of receipt.

Shaw, C. J. 1.—At the common law, where the object is to enforce a forfeiture of a subsisting lease, for breach of condition in the nonpayment of rent, the rule is no doubt strict, requiring a demand of payment by the landlord, at the day. But the direct object of the Rev. Sts. c. 60 § 26, seems to be, not to enforce a forfeiture, but to enable a landlord to

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determine a tenency at will which at the common law, was determinable at the will of either party. The words of the statute, after other modes provided for other cases, are: "And in all cases of neglect or refusal to pay the rent due on a lease at will, fourteen days' notice to quit shall be sufficient."

When the words "neglect" and "refusal" are used in reference to the payment of money, we understand the meaning to be, that refusal is a failure to pay money when demanded; neglect is the failure to pay money which the party is bound to pay without demand. The difference in the meaning of these terms in Merrifield v. Cobleigh, 4 Cush. 178, arose from the difference of the subject matter. There it was held that a grantee was not bound to rebuild a decayed fence, for the benefit of the grantor, without notice or request from the grantor; and therefore there was no such neglect as would work a forfeiture, within the terms of the condition.

But in the present case, the lessee at will was bound to pay his rent at the day, without demand; his failure to do so was a neglect to the rent due; and this gave the plaintiff a right to terminate the tenancy at will by fourteen day's notice; and notice was given on that ground. His right to the possession, and to the aid of this summary process, was fixed by that notice.

2. And the receipt of the money due for rent, after such notice given, will not necessarily operate as a waiver of that right, if the landlord, at the time of receiving such rent, gives notice that he does not thereby intend to waive his right to terminate his lease, or revoke his notice.

If the landlord received such rent without protest, or notice of any sort, it might be inferred, from his silent acceptance of the rent in arrear, that the cause of his notice being removed, it was his intent to revoke it, and waive his right to terminate his lease, as in Tuttle v. Bean, 13 Met. 275, and Collins v. Canty, 6 Cush. 415. But it is a presumption that may be rebutted, and the mere acceptance of rent, under a protest that he does not thereby waive will not raise such presumption; for the money is his due, and he has a right to receive it, without barring his right to terminate the tenancy at will, which is the direct object of the suit. In Tuttle v. Bean, 13 Met. 278, an intimation was thrown out that perhaps a tender of the arrears, before proceedings commenced, might be a bar. But it was stated as an unsettled question, and the case was not decided on that ground. Here the payment was made after the notice given, but before other proceedings were commenced, and the payment was received by the plaintiff under a protest not waiving his right.

Judgment for the plaintiff.

LUCAS v. NICHOLS

5 Gray, Mass. 309

Action of Contract on a written agreement, by which the plaintiff agreed to make certain organs for the defendant at a shop in Boston at specified times and prices, and to deliver them at any place in Boston which the defendant might designate, and to forward them according to the defendant's directions.

The plaintiff and defendant were both described in the writ as of Newton in the county of Middlesex, and the First Universalist Society in Weymouth in this county were summoned as trustees. The writ was served by giving copies thereof to the defendant and trustees. At the first term, the defendant appeared and filed an affidavit of merits; and the trustees filed an answer, and were afterwards discharged. After their discharge, the defendant moved to dismiss the action, because all the persons summoned as trustees had been discharged, and there had been no such service of the writ on the defendant as would be sufficient in an action commenced in the ordinary mode of process, and the defendant had not answered, and was not bound to answer to the suit. But Byingtan, J. overruled the motion, and ordered the defendant to answer, and the case to stand for trial.

The answer averred that the defendant had performed the agreement on his part, and that the plaintiff had failed to perform his part of the agreement. At the trial, the plaintiff introduced evidence that he made a large number of organs for the defendant pursuant to the

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agreement, and the defendant was often in the plaintiff's shop, and was told by the plaintiff that the organs were ready for him, and was requeshted by the plaintiff to take them away, but never took away but three of them, or gave any direction for the delivery of the others.

The judge instructed the jury that the plaintiff must prove that he continued to perform the agreement until it was complete, or until the defendant committed a breach of the agreement, by refusing to receive the organs according to it; that the defendant having designated no place for their delivery, the plaintiff must make and deliver them at his shop, and that was the place for the defendant to receive them. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Bigelow, J.—The motion to dismiss this action was rightly overruled. Although both plaintiff and defendant lived in the county of Middlesex, the writ was properly made and returnable in the county of Norfolk under Rev. Sts. c. 109 § 7; c. 90 § 16; c. 2 § 6 cl. 13. Lewis v. Denney, 4 Cush. 588. The corporation, being quasi local, could be properly summoned as trustees only in the county of Norfolk, where they had their place of business and held their meetings. The writ, being rightly made returnable in the county of Norfolk, could well be maintained and prosecuted in that county, after the discharge of the trustees, against the principal defendant, under Rev. Sts. c. 109, § 10, because the service of the writ on him would have been sufficient, if the action had been commenced by a common writ. Belknap v. Gibbens, 13 Met. 475. Brown v. Webber, 6 Cush. 569.

The ruling of the court upon the question of delivery of the organs was correct. The rule is, where no place is designated, in a contract of sale, for the delivery of an article to be manufactured by the vendor, and if he is ready at the time appointed to make delivery there, he has fulfilled his part of the agreement. Middlesex Co. v. Osgood, 4 Gray, 449. Where the vendee is, by the terms of the contract, to designate a place of delivery, the vendor is bound to be ready to make delivery at the place designated. If the vendee omits to designate the place, the vendor is guilty of no breach of contract, if the articles are ready for delivery at the time fixed by the contract.

Exceptions overruled.

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